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NUCLEAR REGULATORY COMMISSION OVERSIGHT

HEARINGS

BEFORE THE

SUBCOMMITTEE ON NUCLEAR REGULATION

OF THE

COMMITTEE ON
ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

FIRST SESSION

OCTOBER 8 AND 20, 1987

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NUCLEAR REGULATORY COMMISSION OVERSIGHT

Office of Investigations

THURSDAY, OCTOBER 8, 1987

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
SUBCOMMITTEE ON NUCLEAR REGULATION,
Washington, DC.

The subcommittee met at 9:38 a.m. in room 406, Dirksen Senate Office Building, Hon. John B. Breaux (chairman of the subcommittee) presiding.

Present: Senators Breaux and Simpson.

OPENING STATEMENT OF HON. JOHN B. BREAUX, U.S. SENATOR FROM THE STATE OF LOUISIANA

Senator BREAUX. The subcommittee will please come to order. Our colleague, Senator Alan Simpson, is on his way and will join us shortly.

This morning the Subcommittee on Nuclear Regulation meets to continue hearings on issues related to the operation of the Nuclear Regulatory Commission. This effort, which began earlier this year with the budget and authorization hearings, has undergone a tremendous shift in effort and focus as a result of the now well-publicized controversy surrounding the independence and integrity of the Commission's investigative functions.

On May 6th of this year all members of the subcommittee, as well as our distinguished full committee chairman and ranking member, joined me in the decision to initiate our own investigation into the facts and circumstances surrounding the controversy. To quote from our joint press statement at the time:

> We are interested in determining whether the Commission has hampered the operation of the NRC's Office of Investigations and whether there has been interference with the operation of the Office of Inspector and Auditor. Because of the importance of the integrity of the NRC to ensure the continued safe operation of nuclear powerplants, we are determined to establish whether or not the NRC's operations, as the guardian of the safety of the public from nuclear mishap, has been compromised and to determine what steps we must take to correct any problems. Commercial nuclear power has an important role to play in helping to sustain our Nation's energy independence, but it is only through the independent and unfettered operation of the NRC that public confidence in the commercial nuclear power industry can be maintained. We believe that only a thorough airing of any problems leading to corrective action by the NRC and the Congress can restore the public confidence in this agency and in the commercial nuclear power industry.

In fulfillment of that commitment, our staff—with the assistance of personnel on assignment from the General Accounting Office—

has reviewed thousands of pages of documents and conducted scores of interviews with individuals familiar with all of the operations of the Commission. While our investigation is not yet finished, certain things and trends have begun to emerge which deserve review and debate on the public record.

Today, in two separately-scheduled hearings, we will begin the process of debating, in this committee, the Commission's investigative offices and their proper role, and the statutory mandate of the Commission to protect the public health and safety.

This morning, our hearing will focus on the Commission's Office of Investigations, the office charged with responsibility for investigating allegations of wrongdoing by the Commission's licensees, their employees, and their contractors. Obviously, given the Commission's reliance on the good faith efforts of these parties to comply with Commission regulations in an effort to ferret out conduct that amounts to purposeful evasion of such regulation is an important component of the enforcement powers of the Commission.

This afternoon, our hearings will focus on the internal watchdog of the Commission, the Office of Inspector and Auditor. Additional hearings scheduled this month will examine other areas of the Commission's operations, policies, and procedures that we believe are relevant to the issue of public confidence in the NRC's regulatory posture.

While the debate on some of these topics might not be considered jazzy enough to be newsworthy in and of themselves, a full and fair presentation of debate—as well as actions taken as a result—are, in this Member's view, critically important to the future of nuclear power in this country. This Member recognizes that generally there are two sides to every issue, and hopefully our hearings will be able to give a fair and impartial treatment to all aspects of the issues that are before the committee.

This Senator would also note that other committees in the Congress, particularly in the Senate, have taken it upon themselves to try and unite into one external Office of Investigations both of the functions that are currently covered by the jurisdiction of the NRC. That is something that this committee is not going to take lightly: Our responsibility as the authorizing committee for the NRC to give proper consideration to what is the best recommendation as to how the NRC should operate. That's the purpose of these hearings, and we will continue to pursue that goal.

While we await Senator Simpson we will welcome our first witnesses and get their testimony. This morning, the first panel consists of the Commission members. We welcome each and every one of you. Glad to have you before us.

Mr. Chairman, we will receive your testimony and comments from any of the other Commissioners, if they desire to make any.

Chairman Zech?

STATEMENT OF HON. LANDO W. ZECH, JR., CHAIRMAN, NUCLEAR REGULATORY COMMISSION, ACCOMPANIED BY THOMAS M. ROBERTS, COMMISSIONER; KENNETH M. CARR, COMMISSIONER; FRED BERNTHAL, COMMISSIONER; AND KENNETH C. ROGERS, COMMISSIONER

Mr. ZECH. Thank you very much, Mr. Chairman.

Mr. Chairman, I am pleased to appear before you today to discuss the Nuclear Regulatory Commission's Office of Investigations, OI. I appear before you with my fellow Commissioners.

I will begin with a description of the functions of the office, then discuss its relationship with the Commission, and conclude by explaining why the functions of both the Office of Investigations, OI, and the Office of Inspector and Auditor, OIA, should not be placed in a single office.

The Office of Investigations' sole responsibility is to investigate alleged wrongdoing by licensees, their contractors, vendors, or others in the regulated industry; that is, those external to NRC. The Office of Inspector and Auditor conducts audits for the agency and also investigates allegations of wrongdoing by NRC employees and contractors; that is, people internal to NRC.

Until about 5 years ago, the Commission had no specific office charged with investigating wrongdoing on the part of licensees or others in the regulated industry. By "wrongdoing" in this context, I want to emphasize that I am referring to questions of whether a licensee or other regulated entity or their employees willfully or intentionally violated NRC regulations. In the vast majority of cases in which the staff uncovers violations, no evidence of wrongdoing which requires an investigation is present.

Prior to the creation of OI, the responsibility for investigating such wrongdoing rested with the Office of Inspection and Enforcement, IE, and the regional NRC offices. Both IE and the regional offices were staffed with individuals with appropriate technical expertise, but few had investigatory training. For a variety of reasons, the Commission decided that this approach to investigating licensee wrongdoing was inadequate. In 1982 it created OI, staffed by trained investigators. OI is authorized 45 positions. Currently, there are 34 professional investigators in the OI organization. Its mission is to investigate alleged wrongdoing by licensees or others in the regulated industry and thereby assist the Commission in making the appropriate safety determinations in its licensing and enforcement decisions.

In 1983, the Commission assigned the responsibility to OI for making appropriate referrals to the Department of Justice if OI investigations indicated the possibility of criminal misconduct.

The primary purpose for establishing OI was to assist the NRC's licensing and regulatory determinations. In fact, most investigations do not result in criminal referrals or prosecutions.

OI performs its assigned function by providing investigative facts relevant to whether there has been intentional or willful violation of NRC requirements. This provides important factual input which helps shape the ultimate licensing and enforcement decisions the agency makes. Therefore, the Commission considers the investigative function a key and integral part of an effective regulatory process, and OI to be an essential NRC office.

OI responsibilities primarily involve conducting investigations regarding allegations of licensee wrongdoing. For example, in investigating these particular instances where senior officials of applicants and licensees are alleged to have been deliberately not forthright with the NRC, have willfully supplied the NRC with inaccurate information, or have otherwise acted with less integrity than the Commission expects of its licensees, OI will conduct an investigation. It should be emphasized that the technical staff reviews the great majority of alleged violations, but when there is a reasonable basis to believe that the violation was willful, OI is called in to investigate the alleged violation of NRC regulations or licensee conditions.

OI also investigates allegations that utility officials have sought to harass and/or intimidate workers for raising safety concerns.

OI investigations are important elements in our regulatory decisions and in our confidence in the adherence of licensees to our requirements. By nature of its mission, OI must work closely with the NRC's regulatory staff. An effective working relationship between OI and the staff is important because OI does not make judgments regarding public health and safety—instead, it produces investigatory information which is useful to those who are responsible for making regulatory decisions.

The necessary expertise for making health and safety recommendations and judgments resides in our regulatory staff, with the Commission having the ultimate responsibility for making these decisions.

Thus, OI's function must be placed in context. Investigatory information relating to alleged licensee wrongdoing is just one part of the information base used to make licensing and enforcement decisions. Most of the technical safety issues and concerns relating to individual license applications are resolved through routine inspections by NRC inspectors and license application reviews by appropriate technical staff. Many of the regulatory violations are discovered through routine inspections or are identified and reported to the NRC by the licensee, and are resolved through our normal enforcement process without the need for an OI investigation.

OI investigations may be initiated at the request of the Commission, the Executive Director for Operations, a Regional Administrator, or at the initiative of the Director, OI. Senior NRC staff employees meet regularly with OI representatives to make recommendations to OI regarding the significance of an investigation and the priority an investigation should receive. To assist OI in carrying out its responsibilities, the NRC staff assigns the necessary individuals to help OI conduct its investigations when technical expertise is needed. If the NRC staff becomes aware of information relevant to an ongoing OI investigation, it is required to communicate that information to OI. In turn, OI keeps NRC offices which request OI investigations informed of significant developments in ongoing investigations.

Although they have different investigative responsibilities, OI and OIA also share information. If either OI or OIA obtains information that would be of assistance to the other office in carrying out ongoing investigations, it communicates the necessary information. However, because the basic missions of the two offices differ, there have been few instances where such exchanges have taken place. In the past 2 years, OIA has referred 10 matters to OI; similarly, because the two offices perform distinct functions, only in the rare case would a joint OI/OIA investigation be useful or efficient.

Even though OI, OIA, and the regulatory staff under the EDO have different responsibilities, it is important that these offices communicate with one another. To this end, the Director of OI and OIA and the Executive Director for Operations—the EDO—meet periodically to discuss matters of mutual interest.

I turn now to the relationship between the Commission and the OI. Since its inception the Director, OI has reported directly to the Commission. The Commission does not plan to change that relationship. In its supervisory capacity, the Commission provides policy guidance to OI. For example, it can set its investigative priorities and it approves generic policies governing the investigative program. When it opens an investigation, OI so informs the Commission. OI gives the Commission periodic briefings on the status and results of its investigations. On a monthly basis the Commission receives status reports on all ongoing OI investigations. The Director of OI also has regularly-scheduled meetings with the Chairman of the NRC.

Once an investigation is initiated, OI has full authority to conduct investigations, reach conclusions, and refer matters to the Department of Justice. OI can self-initiate investigations and can issue subpoenas.

In April 1987, the Commission modified certain procedures which the Director, OI had recently indicated could hamper his independence. The Commission removed a requirement that OI consult with the Office of General Counsel before referring a matter to the Department of Justice, although the Commission encouraged OI to seek such counsel. It also eliminated a requirement that OI consult with the Commission before making referrals to the Department of Justice relating to material false statements. This was followed by a decision by the EDO not to extend the life of the Investigations Referral Board, the IRB. The EDO established that board for a six-month trial period in November, 1986 as a management tool to ensure that matters being referred by the NRC to OI for investigation and the priorities being given those investigations were appropriate. The Executive Director for Operations concluded that the IRB was not necessary to perform these functions.

The Commission is fully satisfied that the appropriate functions have been assigned to OI and that its relationship with the Commission is the appropriate one. The Commission is satisfied that OI is fulfilling its mission to provide investigative facts needed in the regulatory decision-making process. The Commission believes that a strong, competent and independent OI, staffed with experienced investigators, is essential to provide investigative facts for use in licensing and enforcement decisions when allegations of wrongdoing are raised.

A strong OI also helps ensure that the Commission can carry out its statutory mandate in an effective way. However, maintaining the independence of OI must be balanced against the agency need to ensure that OI's investigations are focused to provide the information useful to NRC's licensing and enforcement process. An OI reporting directly to the Commission is the best means of accomplishing both of these goals.

Consistent with these views, the Commission opposes S. 908 as reported by the Senate Committee on Governmental Affairs. That proposed legislation would create an Inspector General within the NRC that would perform the functions currently performed by both OI and OIA. The Commission unanimously believes that OI's functions should not be part of any Office of Inspector General established by the Congress for the NRC.

The Commission is particularly troubled by that legislation because it could prevent the Commission from having a role in the initiation, carrying out, or completion of any investigation by OI. Such legislation would interfere with the Commission's ability to carry out its regulatory responsibility to protect the public health and safety and the common defense and security. As I have mentioned previously, the reason OI exists is to provide investigative information for staff determinations and Commission decisions about the industry we license and regulate.

Currently, the Commission has the authority to set priorities for the Office of Investigations. It has the authority to direct that office to conduct an investigation promptly or to temporarily suspend an investigation because of a need to devote resources to higher priority items. The absence of this authority might jeopardize the Commission's ability to assure that public health and safety issues receive the most appropriate attention. Just as the Commission can direct the technical staff where to focus its attention, the Commission needs to be able to focus OI's attention on matters the Commission believes are most important.

For these reasons, Mr. Chairman, the Commission strongly opposes legislation which would isolate OI from the Commission. The same reasoning leads us to conclude unanimously that OI should not be made part of an Inspector General's Office, if such an office is established.

Mr. Chairman, this concludes our testimony. We appreciate this opportunity to appear before the subcommittee today, and we are ready to answer your questions.

Thank you, Mr. Chairman.

Senator BREAUX. Thank you, Mr. Chairman.

Mr. Bernthal, you indicated you have some comments you'd like to make.

STATEMENT OF FREDERICK M. BERNTHAL, COMMISSIONER, NUCLEAR REGULATORY COMMISSION

Mr. BERNTHAL. Yes, Mr. Chairman. With your permission, I have written down some brief comments which I'll submit for the record, and I'd like to summarize those in a minute or two.

Mr. Chairman, from the outset, I have held a perspective somewhat different from that of my colleagues on the issues of a statutory Inspector General for the NRC and the designation of the Commission's Office of Investigations as a statutory entity reporting to the Commission, and I am pleased that the Commission now apparently no longer raises strong objections to the establishment of an Inspector General for the NRC.

I, too, remain unconvinced that an impartial examination of the record would suggest a compelling need for a statutory Inspector General at the NRC. But while it may not be strictly necessary, a statutory IG would relieve the Commission of a burden that it can do very nicely without. Three times now since I have been a member of this Commission, under two different heads of the Office of Inspector and Auditor, I have seen inordinate diversion of valuable Commission time and attention to dealing with assertions that OIA has not done its job properly.

Therefore, if the Congress feels strongly that such an office would permit the Commission to carry out its statutory responsibilities more efficiently, I do not now object and I never have objected to such a change.

With regard to the Office of Investigations, Mr. Chairman, if—as Senator Glenn earlier represented at a hearing on this issue chaired by him—consistent with the original version of S. 908, the sole purpose in designating OI as a statutory office would simply be to preserve the status quo in which OI reports to the Commission and is under the general supervision of the Commission, then I have no difficulty whatsoever with that proposition.

The only practical effect of such legislation would be to prevent the Commission from ever requiring the head of the Office of Investigations to report to the EDO. Since I have never supported such a change, and since it is now clear that the Commission is highly unlikely in the foreseeable future to attempt such a change, and since there seems to be little disagreement on the need for an Office of Investigations, I find no reasonable basis for Commission objection.

But the provisions of S. 908, as the Chairman has pointed out, as amended and reported out by the Committee on Governmental Affairs, would now cast OI within the office of a statutory IG, and I completely agree with the continued unanimous opposition of the Commission to such a provision.

The committee should also note, Mr. Chairman, that even the original version, however, of S. 908 to provide a statutory basis for the status quo with respect to OI, suffers from some internal inconsistencies. The language could be read as denying the Commission its authority to set broad priorities for the use of investigative resources of the agency and to apply those resources to matters having the highest priority for the Commission's public health and safety responsibility. OI should have and does have all the independence necessary to carry out its responsibilities as the investigatory arm of the Commission. But independence should not mean that as an organization, OI is divorced from the staff or the Commission. That would endow OI with a character somewhat more akin to a mini-FBI than to an agent of the Commission.

Mr. Chairman, it is indeed unfortunate that as an indirect consequence of what I believed at the outset to have been an unwise and untenable position taken by the Commission majority on the specific legislative proposals at issue, establishment of an independent Inspector General and confirming in statute the Office of Investigations as currently constituted, the Commission has found itself further embroiled in needless controversy. Most of this has occurred because of ill-considered—indeed, I would say almost unconsidered—Commission opposition to these two straightforward proposals that, for the reasons I have noted, would be of minimal practical consequence for the day-to-day operation of the Commission.

Mr. Chairman, this NRC will never be perfect; but to this day, when it comes to the professional integrity, the credentials, and the dedication of its employees, I will stack the NRC up against any agency in the Federal Government.

That concludes my summary, Mr. Chairman.

Senator **Breaux**. Thank you, Mr. Bernthal.

Any of the other Commissioners have any comments that they would like to make?

[No response.]

Senator **Breaux**. If not, I want to recognize the distinguished ranking member, Senator Simpson, for any comments he might have.

OPENING STATEMENT OF HON. ALAN K. SIMPSON, U.S. SENATOR FROM THE STATE OF WYOMING

Senator **Simpson**. Thank you, Mr. Chairman. It's good to be here.

Welcome to Dr. Rogers. I believe this is your first appearance before this subcommittee.

Mr. **Rogers**. That's correct.

Senator **Simpson**. We welcome you, and I think you will see that the subcommittee will keep a fine standard of fairness and thoroughness, which I surely tried to do as chairman, and I have become very convinced that that is exactly what Senator Breaux is doing. It is a great pleasure to work with him on these issues, and they are indeed tough ones. I haven't found any easy ones yet, so I commend the Chairman and indeed look forward to working with him.

So here we are, with our hearing today. We have quite a schedule coming up in the next weeks. It's the public culmination of a lengthy and productive inquiry that the Chairman has conducted, and I have been assisting, together with the unanimous support of the other subcommittee members, initiated over 5 months ago. We announced these comprehensive subcommittee investigations on whether there exists at the Commission a pervasive attitude of complacency. That's what we're looking at. When it comes to investigating wrongdoing, whether by NRC employees or licensees, the charge is that it's often just simple coziness with the industry; that's the charge.

We have been ably assisted in our efforts by two very fine individuals from the GAO, John Barker and Jack Bagnulo. With their assistance we have conducted this comprehensive review. During the course of our investigation, which we hope is a fact-finding inquiry, we churned through a lot of documents. We've interviewed lots of individuals from all sides. We've sent our investigators into the field to talk to people. We have developed what I consider to be a balanced and complete record setting forth the facts.

But today we're not going to do any focussing on the specific case of wrongdoing. We will not, I expect, generate much fodder for tomorrow's trade publications; those details will be set forth later in a balanced and complete way when the investigative results are presented in some appropriate written form by the subcommittee.

But we've done this exhaustive review. We've extended our inquiry into new areas. We don't find the pervasive pattern of indifference or hostility by the Commission—there have been some very honest and open differences, that's certain, on how best to organize and manage the investigative function. There have been occasional and isolated instances where things would have been done differently if we had to do them over again. But I don't quite see the intensity of destructive behavior that I would have thought, and perhaps most importantly, there have been some strongly-held views by some strong-willed individuals on all sides of this issue. In fact, there has been a remarkable battle of personalities in this curious arena that, more than anything else, explains—at least to me—just what is going on in this marvelous, ever-thrilling battle for turf which is, of course, the credo of Washington, D.C.

So when all is said and done, when we complete our hearings and when the Williams investigation is finished and when the Department of Justice completes its work, when the dust settles, I think there's one very painful and unavoidable fact that's going to remain. We have an agency—and I have felt this for so many years—that, in the words of the post-TMI Rogovan Report is, incapable, in its present configuration, of managing a comprehensive national safety program for existing nuclear powerplants adequate to ensure public health and safety.

Think about that. That's a heavy statement, right after TMI; the Commissioners then and all of you are fine and honest people. I'm amazed that we can get people like you into this particular operation. But you really cannot succeed, ever, in performing your task, and I really believe that. I have come to know you and admire you greatly. You work hard, but you are trapped in a feckless exercise. Indeed, I think you are virtually the only remaining health and safety agency in this town consigned by Congress to carry out your statutory responsibility within the constraints of an unwieldy, inefficient, and ultimately unworkable Commission structure.

We in the Congress should wake up and smell the coffee. The time has come, I think, to move forward with a solution, to address the real issue here rather than the eviscerating of the Commission, of its various programs, for the sake of "independence," or duplicating those tasks in some other agencies or boards.

And for those reasons I, today, am going to introduce legislation to convert the Commission to a single-administrator agency. I hope that will be received well, and at least we will have hearings. I know the Chairman will be discussing that. It is virtually identical to legislation I introduced in the 99th Congress. We will begin the important task of education, but the need for action is ever more urgent with another year now passed.

Those are some of the things that I'm going to be up to. I look forward to working with you, Mr. Chairman, as we move forward on this important series of hearings and in joining with you in the effort to fashion some sensible and responsive legislation to address these pressing problems facing the Commission.

I thank you.

Senator **Breaux**. Thank you very much, Senator Simpson, for your statement, and I thank the members of the Commission for being here.

Chairman Zech, to start with, your statement reflects this ongoing—I would use the word "tension," perhaps—between some of the internal operations of the NRC dealing with your regulatory aspects versus these investigative aspects. I think—at least, this Member does—there clearly has been some tension during that period.

Since our hearings have started and some of these things have come out, some rather substantial changes have been made which you have spelled out as to how these two agencies are going to interact. A lot of it has been in the press; a lot of it is the result, perhaps, of these hearings; a lot of it, I guess, is a good faith effort on the part of the Commission to make some positive changes.

You point out that in April, the Commission, number one, removed a requirement that the Office of Investigation consult with the Office of General Counsel of the NRC before referring a case to Justice. You also, secondly, eliminated a requirement that OI—the Office of Investigations—have to consult with the Commission before making referrals to Justice relating to material false statements. And third, NRC has decided—at least, EDO has decided—not to extend the life of the Investigations Referral Board. So those are three rather major changes that have occurred since our hearings started and since a number of other things have occurred.

Is the current document still the SECY-85-369, which supposedly spells out the policy as to how these things are supposed to operate? Is that what currently governs NRC?

Mr. **Zech**. We have, indeed, made some of those changes, Mr. Chairman. I believe the reference you're referring to—I'm not positive, but I think it's our Office of Investigations manual; is that——

Senator **Breaux**. I'm trying to find the document that we want to include in the record, which would be the latest compilation of relationship and policy as to how the Office of Investigations is supposed to operate with the NRC's regulatory operations. Is there such a document? Is there something that spells out how this is supposed to operate, other than your testimony? I assume there is, and I would like it for the record. If you could allude to it and tell me if there is such a document.

Mr. **Zech**. Yes, there is such a document, Mr. Chairman, and I will supply it for the record.

Senator **Breaux**. I understand from our review of the document that it indicates that the threshold for investigations to find out when an investigation at OI should be instituted—that the documents indicate that the threshold is where an allegation has been made and where "there is a reasonable basis for a belief of wrongdoing," and secondly, that "the staff determines that an investigation is necessary for it to decide whether enforcement or other regulatory action is required." Is that an accurate statement or characterization of the current policy of the NRC?

Mr. **Zech**. Yes, it is, and I think the policy statement you're referring to, Mr. Chairman, is what we call SECY-85-369.

Senator **Breaux**. That's what I was referring to. Has that been updated to reflect the changes that you referred to in your testimony? I don't think it has.

Mr. **Zech**. I'm not sure if it has, Mr. Chairman. I'll have to check on that, and I'll supply that for the record.

Senator **Breaux**. Well, what we want is the latest document that ~~indicates the~~ policy of the NRC with regard to the Office of Investigations.

Mr. **Zech**. I will supply that for the record, but I can assure you that those changes that you referred to in my statement are effective and are being incorporated, if they are not already incorporated, in our manuals and our policy statements. But I will give you, for the record, that statement. (See p. 40.)

Senator **Breaux**. I commend the changes. I think the changes were things that needed to be done, and I am pleased to see that they have been done.

Can you tell me what happens when there is a disagreement between the technical staff of the Commission and the investigative staff about whether or not this "reasonable belief" exists in order to pursue an investigation for enforcement or other regulatory action? What happens? How do you solve a disagreement between the two staffs if one says, we don't think there's any need for an investigation, and perhaps the technical staff says, yes, we do believe there is one?

Mr. **Zech**. Well, first of all, the technical staff—as you have emphasized, Mr. Chairman, and as I have mentioned in my statement—does indeed involve itself in solving the bulk of our safety decisions. In other words, the technical staff is the staff that's charged directly with regulatory responsibilities for public health and safety, and the Office of Investigations is in a supporting role. That's very important and sometimes misunderstood.

So when there is a disagreement in a case like this, I think it's very clear that if the staff wants an investigation conducted, Office of Investigations is going to conduct that investigation. If on the other hand the Office of Investigations thinks that an investigation should be conducted and the staff does not, necessarily, the Office of Investigations—we have given them the authority to conduct that investigation on their own authority. We've actually given the Office of Investigations the authority to refer to the Department of Justice, on their own authority, any matter that they think should be referred. The only requirement we've laid on the Office of Investigations ~~in~~ that regard is that the Commission be informed.

Senator **Breaux**. So the Director of the Office of Investigations can conduct an investigation without the consent, approval, or anything else needed from any of the NRC Commissioners or any of the regulatory staff of the Commission itself? If they find that they think these requirements are met, they can pursue it without having to ask permission from anyone within the Commission or the technical staff or the regulatory staff of the Commission?

Mr. **Zech**. Yes, sir, that's correct.

Senator **Breaux**. Does the NRC have the authority to stop an investigation after it's been begun?

Mr. **Zech**. Yes, we do, but our main involvement is in prioritizing investigations. We do have the authority to stop an investigation; on the other hand——

Senator **Breaux**. I'm sorry. Do you know if you've ever done that?

Mr. **Zech**. I don't think it's ever been done. In fact, I am informed here that it has not been done.

I would say that I think it's important to recognize, Mr. Chairman, that from a practical standpoint the Commission feels—and I believe I speak for all of my fellow colleagues—that we have given our Office of Investigations a tremendous amount of independence and authority, and we've done that deliberately. I think the fact that we've allowed our Office of Investigations, on their own authority, to refer to the Department of Justice any matter that they think should be referred, with the only requirement being to inform the Commission, in itself speaks for the amount of independence we've given our Office of Investigations.

Senator **Breaux**. Let me ask you, perhaps, hypothetically. Suppose the Office of Investigations on its own initiative begins an investigation into what they perceive to be wrongdoing by an employee or inspector or a regulatory person of the NRC, and that investigation is ongoing, and the investigation is leading to a situation where the wrongdoing of an NRC employee compromises the health and safety from that facility. They inform the NRC of this, and your regulatory staff says, my God, we'd better get in there and shut this plant down, or, we'd better get in there and bring the officers and directors of the company on the carpet, because if they don't something bad is going to happen. And the Office of Investigations says, my God, if you do that, you're going to compromise the potential criminal investigation that we have; stay out of our way.

How is that type of conflict, if it's ever presented, to be resolved?

Mr. **Zech**. First of all, Mr. Chairman, let me say that you've presented a hypothetical case that would involve both our Office of Investigations and perhaps our Office of Inspector and Audit or because the Office of Investigations focuses on licensees, contractors, and so forth, external. Now, when you say a regulator, that would be perhaps inside the NRC——

Senator **Breaux**. I phrased it, perhaps, incorrectly. Assume the scenario is that the Office of Investigations is investigating a wrongdoing of employees of the utility companies——

Mr. **Zech**. Right.

Senator **Breaux** [continuing]. And then your people say, my God, it's going to compromise health and safety; and they say, stay out, you're going to compromise my criminal investigation. How is that resolved?

Mr. **Zech**. Well, that case—I think we can almost suggest that perhaps the case that happened at the Peach Bottom plant recently is a good example of near that hypothetical situation. I can't get involved in all the details of that because it's ongoing; on the other hand, I think I can speak in a generic or hypothetical sort of way to show you that in that particular case there was a cooperative effort between our Office of Investigations and our staff. The first recognition of it came to the staff; the staff involved the Office of

Investigations, and jointly they looked into the situation. The Office of Investigations made a preliminary determination that there was potential wrongdoing at that plant by those operators; in other words, they thought there was enough evidence to prove that the operators were inattentive to their duties, sleeping on shift and so forth, and in that particular case that would then determine—even though a preliminary determination of wrongdoing by our Office of Investigations was referred to the staff, the staff—recognizing that that potential kind of wrongdoing could have an impact on public health and safety—then issued an order to shut down the plant. I think that——

Senator **Breaux**. The point that I have, and I'll get to Mr. Bernthal after this question, is there a procedure that resolves that kind of a conflict anywhere on the books? Or is it pretty much "we'll decide it on an ad hoc basis as it occurs"?

Mr. **Zech**. Well, let me just respond this way, Mr. Chairman. Office of Investigations is required to give those kinds of determinations, even preliminary, to the staff, and the staff then makes the safety determination. OI does not make——

Senator **Breaux**. You're talking about the regulatory staff?

Mr. **Zech**. Sir?

Senator **Breaux**. You're talking about the regulatory staff?

Mr. **Zech**. The regulatory staff. The regulatory staff and the Commission make these regulatory decisions, not the Office of Investigations. The Office of Investigations is a service organization. They supply their potential wrongdoing, even though it's not a conclusive case yet—they supply that to the staff. The staff then, and possibly the Commission, makes the regulatory determination, not the Office of Investigations. I think that's very important to understand. It really means that the Office of Investigations is an important function, plays an important function, but they are in a supporting role in wrongdoing cases. And I should emphasize the fact that this is a very small percentage of the cases that our whole agency involves itself in. Most all the cases we get, of course, can be resolved by the staff because they don't involve wrongdoing. But when there is wrongdoing on the part of a licensee, then if it looks like that could have a safety impact, that is turned over to the staff or the Commission, where the regulatory determination is made.

Senator **Breaux**. Mr. Bernthal?

Mr. **Bernthal**. Mr. Chairman, my sense is that your question gets to the point of what takes priority in the hypothetical case that you outlined. I think it has to be said very clearly that the Commission's first responsibility is for public health and safety, and in the case of a disagreement—or more likely a question, as a practical matter—as to what should take priority, the Commission is the final arbiter of such circumstances. And there is no question that the Atomic Energy Act envisions that first, we take responsibility for public health and safety, and then the niceties and requirements of preserving a criminal case—certainly, in concert with the Department of Justice and their important responsibilities—are also carried out.

Now, as a practical matter, we have rarely if ever seen a circumstance where we were unable to resolve those two somewhat conflicting objectives. But the priority, I think, is very clear.

Mr. ZECH. Mr. Chairman, if I may just make one brief statement to emphasize that comment.

Senator BREAUX. Mr. Zech?

Mr. ZECH. It should be recognized that public health and safety is predominant in our organization, and that even if a case is referred to the Department of Justice, we would take immediate action if it would appear that public health and safety is involved. That's important, I think, to keep in mind. We are committed to that. We recognize that always; and even though wrongdoing or Office of Investigations would be involved in something, even of a potential criminal matter, if it involves public health and safety there is where our predominant responsibilities lie, and we would take action if necessary.

Senator BREAUX. Mr. Carr?

Mr. CARR. Yes. I think in this particular case, it would be between us and the Department of Justice to work out that priority, and I think we would have to negotiate with them to make sure that we were going to take care of the public health and safety.

Senator BREAUX. There is also a problem prior to the time it would get to the Justice Department.

Mr. CARR. Well, but OI would be the one to refer it to the Department of Justice because OI doesn't prosecute the cases.

Senator BREAUX. Assume that in the middle of an OI investigation of wrongdoing, when they're right in the middle of a case, preparing it to submit to the Justice Department; and in consultation with the Commission's regulatory staff you find that, my God, these activities—if they are in fact happening—are real detriments to public health and safety. I want to find out very clearly what authority you have to come in and do health and safety measures. Wrongdoing investigation is fine, but it doesn't do us any good if a plant blows up even though we've got a conviction of the people who caused it.

Mr. CARR. I agree. There's no doubt on the public health and safety that we have that responsibility. We would make the decision. But I think that you would find, in practicality, that what would happen is that there would be a quick three-way meeting between Justice, OI, and the Commission.

Mr. ZECH. But let me emphasize, Mr. Chairman, that it's clear in my mind that that responsibility is ours. Public health and safety is ours. And the Department of Justice, on many different occasions, has expressed that view to us that they recognize that if public health and safety are at issue, that's our responsibility. They would not prevent us from making a determination if indeed public health and safety is involved. That's our decision and we would make that decision.

Senator BREAUX. All right. Well, I'm glad to hear that; I think that that type of policy is correct, but we have to make sure that it's spelled out with regard to the fact that you all have a call on pursuing the health and safety remedies prior to waiting for an investigation.

Mr. ZECH. There's no question about that, Mr. Chairman. We recognize that as our call. That's our responsibility; we would make that determination. If public health and safety is involved, that's our responsibility and we would so act.

Senator **Breaux**. Senator Simpson?

Senator **Simpson**. Thank you, Mr. Chairman.

The interesting part of that for me, in listening, is that you talked about the primary or predominant issue of the NRC being the public health and safety. I would hope you would get that definition more crisp: it is the only issue. There is no other issue, and that's part of what's happened to you all. It isn't fiddling around and counsel ratting around in the channels over there, and criminal investigations; the FBI can do all that.

Your only function in life is the public health and safety. There ain't none other. It isn't predominant; it isn't primary; it's it, and that's what's happened to you. That's my view. I really have seen that. I've been here 9 years, and there isn't anything else. Nothing.

And that's what the American public expects of this collegial body, and they don't get; and every time you slip away from your own mission in life, you get egg all over you.

Mr. **Zech**. Well, Mr. Simpson if I may, perhaps "predominant" is not the right word, as you point out. Perhaps, as you point out, safety is our only mission, and of course, you're right.

Senator **Simpson**. Well, it's not "perhaps," Lando, it is. That's what the statute says.

Mr. **Zech**. Well, what I want to say is that we fully recognize that. Just because we get involved in other matters, we know that public health and safety is our mission, our only primary mission, our most important—it's the only mission we have that really overrides everything. What I would like to say is—I tried to say that if something goes to Department of Justice, for example, and it is a public health and safety matter, we would not hesitate to make that decision. We know that is our determination to make. Public health and safety, Mr. Senator, is with us every day. We know that's our mission—there's no question in our mind; but the fact is, we do get involved in these other matters, and we know that public health and safety is what we have to do. We involve ourselves in that and recognize that every bit of the day.

Mr. **Bernthal**. Senator Simpson, if I may comment, I think you've put your finger on an important issue of this hearing because I note that you, I believe, have testimony before you that would suggest what is an ambiguity, at least, in the Atomic Energy Act as to the Commission's secondary responsibility, shall we say, to pursue criminal investigations. That ambiguity should be remedied somehow. That's a very serious policy question; and in fact, I agree with the suggestion you make that there seems to be some pressure that the NRC should establish a significant criminal investigatory arm within its own agency.

The act does not really specify and provide for that, and you are quite correct about that. As a practical matter we have come to the point where we cooperate rather fully with DOJ on these issues, but there can be no question as to where the priority lies. If the question is, should we shut down the plant, and in so doing blow our criminal investigation, the NRC shuts down the plant.

Senator **Simpson**. Well, I think there's a point here that, as an agency solely responsible for public health and safety, the investigative function must be an integral part of the NRC and not independent of the NRC, perhaps.

Mr. ZECH. We agree 100 percent with that, Senator Simpson.

Senator SIMPSON. And the debate over the independence is fascinating, focusing in many instances on actions that the Commission considered at one point or another but rejected, or on actions that the Commission might at some future time take. Those are nagging questions to us.

Does the Office of Investigations, then, currently report directly to the Commission?

Mr. ZECH. Yes, sir.

Senator SIMPSON. And is there any objection from either Ben Hayes or Vic Stello to the current reporting relationship?

Mr. ZECH. It's my understanding there's not from either one of those, Mr. Simpson. You could, of course, ask them directly.

The Commission feels it's a proper organization as it is now organized, that they report directly to the Commission. I believe Mr. Stello and Mr. Hayes feel the same way.

Senator SIMPSON. Does the Commission, then, have any current intention or plan to change that reporting relationship or any part of it?

Mr. ZECH. No, sir. No, sir.

Senator SIMPSON. Do you have any current intention or plan to abolish the Office of Investigations altogether, or has the Commission ever considered that option?

Mr. ZECH. No, sir.

Senator SIMPSON. So if it's acceptable, would the Commission have any objection to simply codifying that relationship in the statute, putting a statutory underpinning for OI which would be much like we've done with the Office of Nuclear Reactor Regulation, and then providing that OI shall report directly to the Commission?

Mr. ZECH. I would not, no, sir.

Senator SIMPSON. And then, is it clear in your mind that OI has the authority to refer cases to the Department of Justice without first obtaining Commission approval?

Mr. ZECH. Yes, sir. That's our policy.

Senator SIMPSON. And has the Commission ever refused to refer a case to Justice that OI wanted to refer, even though it appears that the Commission technically has that right?

Mr. ZECH. Not to my knowledge. I'm almost certain that that's never happened.

Senator SIMPSON. Finally, then, is OI required to consult with the Office of General Counsel before referring cases? Or is this simply a matter of discretion on their part?

Mr. ZECH. It's a matter of discretion now, Mr. Chairman. This was one of the matters we discussed earlier this year. The Director of the Office of Investigations seemed to feel that it would be better from his standpoint if he was able to do that on a voluntary basis rather than a consulting basis. It gave the appearances of, perhaps, stifling his referals. We didn't want to give any appearance of stifling at all, so we saw fit at that time, rather than requiring him to discuss it and receive comments from the General Counsel, that he do this—we encouraged it, but we didn't require it.

Senator SIMPSON. Well, thank you, Mr. Chairman.

When will the Williams investigation be completed?

Mr. ZECH. I don't know, sir.

Senator SIMPSON. And is there any area or issue that you're aware of where the Office of Investigations objects to existing Commission practice or procedure regarding investigations on the ground that it somehow undermines or inhibits OI's ability to carry out its responsibilities?

Mr. ZECH. I know of no problem in that regard.

Senator SIMPSON. Thanks, Mr. Chairman.

Senator BREAUX. Mr. Chairman or any member of the Commission, make the case for me that OI is an important part of the NRC, to help you and assist you in your main function, which is health and safety.

Mr. ZECH. Yes, sir. There are, from time to time, those cases that come up, when there is potential wrongdoing on the part of a licensee. In that particular case, over the history of the NRC it has been determined that it is important to have an office investigate those particular cases that has a background in investigations.

Some years ago, this was done by people who did not have that particular professional skill. In 1982, it was determined by the Commission that it was necessary to have a more professional group of investigators look into those potential wrongdoing cases. That's when the Office of Investigations was formed; I think it was an appropriate act for the Commission to take.

So today, the Office of Investigations looks at those small numbers of cases that we get that have potential wrongdoing on the part of licensees for the sole purpose of supporting a safety decision. This agency is a safety agency, and the Office of Investigations is a supporting role. And when those cases of wrongdoing would involve a safety decision, that is a staff and Commission determination.

So the Office of Investigations, in my judgment, does play an important role in allowing us—in helping us—to make those safety determinations.

Senator BREAUX. Why would not the regular regulatory staff of the NRC not be able to handle that area?

Mr. ZECH. They were originally, Mr. Chairman. They were assigned to a group, the inspection and enforcement organization in place at that time. They did not have the background in investigations that the present organization has. I believe the present organization, through its performance, has indicated that the Commission is now in a better role to investigate potential wrongdoing professionally.

Senator BREAUX. Can you elaborate for the committee as to why it is apparently your view that an Office of Investigations outside the jurisdiction of the NRC would not be as workable for the purposes of health and safety as one that is structured as it currently is?

Mr. ZECH. Yes, sir, because the sole function of the Office of Investigations is to provide supportive information to the staff and the Commission so that we can make the safety determinations. An Office of Investigations functioning outside the authority of the Commission would not be as accountable for that necessary function that we have. We would, Mr. Chairman, in my view, have to create inside the Commission a similar organization. We need to have at the staff and the Commission the views, in those potential wrongdoing cases, of whether they have health and safety implications.

Health and safety is our role. We need to have that information. We cannot have an Office of Investigations outside of our authority having information about health and safety that we don't know about. We simply must know about anything to do with wrongdoing that would bear on health and safety. That's why we need that function performed within the Commission.

Senator **Breaux**. The Justice Department will testify later, and as I understand it, the gist of their testimony will be that Congress should grant the NRC explicit authority to go ahead and conduct criminal investigations. They talk about the technical nature of the investigations, the matters that are being looked at for possible criminal violations, and I guess they're saying, "Look, this area is so technical, the Office of Investigations and the NRC ought to have within themselves the authority to go ahead and conduct actual criminal investigations," rather than your authority to conduct investigations for wrongdoing, package the case, and then send it to the Justice Department.

Do you have any thoughts about that?

Mr. **Zech**. Yes, sir. First of all let me say that I think that, in general, our relationship with the Department of Justice has improved significantly. We have a very fine and excellent relationship, in my judgment, with the Department of Justice.

However, on that particular issue that you've focused on, I personally would disagree with that. Our emphasis, as Senator Simpson has so strongly pointed out, is on health and safety. We do not want to get involved in pursuing criminal investigations. We do believe that's outside of our department. The Department of Justice, Federal Bureau of Investigation, other agencies have the responsibility for criminal matters. This agency is a health and safety agency.

Senator **Breaux**. Well, could you not make the argument that if it really is the function of the Justice Department and you have an Office of Investigations, that that's going to act as a shield for any Department of Justice investigation of criminal wrongdoing? Because the Department of Justice is going to say, "Look, they've got an OI down there; they're taking care of this wrongdoing stuff," and OI is saying, "Well, we're looking at it from a health and safety wrongdoing standpoint and not from a criminal standpoint."

So the bottom line is that the criminals don't get investigated.

Mr. **Zech**. No, sir, I don't think that that would happen. We do cooperate, as it stands now, very closely with the Department of Justice and the FBI upon request in matters where they need technical help in pursuing criminal cases——

Senator **Breaux**. How many times have they ever come in about matters that are related to the NRC without OI asking them to come in? They don't get involved unless you folks ask them to, do they? You don't have a lot of guys at Department of Justice running around looking at nuclear licensees for criminal wrongdoing?

Mr. **Zech**. Oh, no, no. I'm sorry to misunderstand your question, Mr. Chairman.

No, the Department of Justice involves themselves, to my knowledge, only when we do request that they be involved. They don't go around investigating our plants; they respond to our requests. And of course, this is what the Office of Investigations primarily serves—the function they serve for us, to interface with the Department of Justice on those matters.

Senator **Breaux**. Can you tell us, Mr. Bernthal?

Mr. **Bernthal**. Yes, Mr. Chairman. It really, I believe, would be almost without precedent for an agency such as ours to establish within itself a major criminal investigative arm. And I agree with the Chairman on that point. I thoroughly understand and can sympathize with the desire of the Department of Justice to have a "mini-FBI," as I have termed it earlier, over in the NRC. But that really gets down to a policy question that I think the Congress is going to need to decide.

The way it is right now, the law rather specifically says that we do not carry out criminal investigations, and I've got to tell you that we are very, very close to the point in our agency where that is becoming a major responsibility of our Office of Investigations.

I would make just one case in point here, or recount one case in point. It didn't attract a great deal of attention, but I think it indicates the potential difficulty here. We did have a case some time back where the staff, in their unaccustomed role—the role they did not carry out very well before we had an OI—had reached a determination that, look, there's clearly something wrong here; this is a criminal matter; it should go to Justice.

Well, with all respect to OI and the professionalism that they have, and they have a great deal of it, OI was unwilling to make that referral until it had carried out its own investigation. Well, I think that shows why we have some underlying policy difficulty here, that ultimately, if the Department of Justice wishes to have what it says it wants, it would really require a change in the underlying statute.

Senator **Breaux**. Do we know of any time where OI has referred cases to Justice that have resulted in criminal prosecution?

Mr. **Zech**. Yes, sir, there have been a number of cases that resulted in criminal prosecution.

Senator **Breaux**. Mr. Carr?

Mr. **Carr**. But there have also been a number of cases of referral where Justice chose not to prosecute.

Mr. **Bernthal**. There haven't been very many. I think it would be an interesting question to ask for the percentage, in fact, that have resulted—

Senator **Breaux**. We're going to ask Justice when they come up.

Mr. **Zech**. The specific numbers as I recall them, Mr. Chairman, are that since 1982 OI has referred about 15 cases a year to Department of Justice, and I think the grand total is 71 that they've referred since they've been formed.

Senator **Breaux**. Do we know—Justice will answer—do you know, however, how many have been prosecuted of those that have been referred?

Mr. **Zech**. I think there's——

Senator **Breaux**. If you don't know, it's no problem. We can get the answer from Justice.

Mr. **Zech**. I would guess about 10, but we could provide the exact number for the record, if I may.

[The information referred to follows:]

REFERRALS TO DEPARTMENT OF JUSTICE [DOJ] (AS OF SEPTEMBER 30, 1987)

SUPPLIED BY THE NUCLEAR REGULATORY COMMISSION, OFFICE OF INVESTIGATIONS

72—Referrals;
38—Declined Prosecution;
18—Pending DOJ Decision;
4—Currently Before a Grand Jury;
3—Pending Indictments; and
8—Convictions.

Senator BREAUX. Do you feel that OI is adequately staffed? They asked for 58 at one time; they have 40-something now.

Mr. ZECH. I believe they are. Naturally, Mr. Chairman, most all of our office directors would like more people to do their jobs, at least in these days of tight budgets and so forth. We have to exercise some bit of discipline. I suppose every office director would tell you they would like to have more people. I think they are sufficiently staffed to do their job.

Senator BREAUX. Mr. Bernthal?

Mr. BERNTHAL. Mr. Chairman, I agree with what the Chairman is saying. But if OI is going to be called upon to continue to perform the kind of role that they are increasingly being asked to perform, there's no doubt in my mind that they don't have enough people to do that job. And by that, I mean to serve essentially as a criminal investigative arm. That really, I think, is what is bringing the crunch to OI's resources. Again, as I say, that's a policy issue that I think you all have to decide.

Senator BREAUX. Well, if you look at the number of licensees, 109, and you have 40-some-odd investigators, it's certainly less than half an investigator per plant and all the employees in each plant, so it's an awful lot of territory.

Gentlemen, we thank you—Alan, did you have something?

Senator SIMPSON. No, thank you, Mr. Chairman.

Senator BREAUX. We thank Commission. We have some questions which will be submitted which we'd like you to respond to. Thank you very much for being with us.

Mr. ZECH. Thank you, Mr. Chairman.

Senator BREAUX. I'd like to welcome up now, as the Commissioners leave, Ms. Victoria Toensing, Deputy Assistant Attorney General, Criminal Division, Department of Justice.

Ms. Toensing, I hope I didn't mispronounce it. I'm not sure if I came close to pronouncing your name correctly, but we welcome you to the committee.

STATEMENT OF VICTORIA TOENSING, DEPUTY ASSISTANT ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE

Ms. TOENSING. Good morning, Mr. Chairman. That's pretty close. I want to thank the subcommittee for asking me here to discuss the investigative functions and responsibilities of the NRC. I have a full statement for the record, Mr. Chairman; I will address a few points briefly and, of course, be glad to take any questions that you might have.

The Department of Justice works closely with the NRC through the General Litigation and Legal Advice Section, which is a part of the Criminal Division.

The NRC and the Department of Justice serve two very different and crucial roles in seeing that the nuclear industry is safe. The NRC sets out the technical standards for the nuclear industry, and then it polices the industry through its civil enforcement program. That policing is done through industry self-reporting, routine inspections, administrative investigations. The latter, the administrative investigations, are carried out by the Office of Investigations, or OI, as we affectionately call it. It is an investigative office, very experienced in nuclear power issues. In the Criminal Division we have great respect for their background and their expertise.

However, as has been stated here this morning, the NRC's purpose is to protect the public health and safety. It is up to the Department of Justice to prosecute for criminal acts, and it is at that point—when the civil and the criminal objectives and concerns meet—that the two agencies must complement each other and work very closely together. In the past—as we have all admitted, and as I'm sure the subcommittee knows—DOJ has encountered some difficulty in coordinating its criminal efforts with the NRC; but in the past few years I believe there has been great improvement and we look forward to seeing our relationship improve even more so. Let me just give you an example of that.

In 1986, the Department of Justice played sort of an advisory role when the NRC drafted a definition for "material false statement" which we vigorously opposed because it was considerably more narrow than our statutory 18 U.S.C. 1001, which we all knew and loved and knew how to work with.

The NRC ultimately concurred with our request, and we still have our 18 U.S.C. 1001 to work with on a material false statement.

We have two principal areas of concern in NRC investigations, and I'll address them briefly to the subcommittee.

First, there is a need to strengthen the criminal investigative authority of the NRC. I understand from listening to the subcommittee that that's an opinion not necessarily shared by the subcommittee, but let me point out that the statutes could be described as vague, or at least "not without ambiguity," as I said in my statement. As to whether, for violations of the Atomic Energy Act, the NRC OI investigators—those who are truly the most experienced in these arcane matters—have the authority to investigate criminal cases, I want to say that the NRC has been very responsive when the Department of Justice makes a formal request for its investigators to become involved in a criminal matter. But it would be very helpful for us to withstand any challenges from opposing counsel that it be specified for us in statute. So we suggest to the subcommittee that they might want to consider some kind of legislation which would say that the NRC has concurrent authority with the FBI to conduct these criminal investigations.

The second concern where we have a deep interest is in the continuing investigative independence of the OI. We understand that the current practice at OI is that they retain full authority to refer matters to the Department of Justice, absent any kind of Commission vote to the contrary, and we believe every step should be taken to ensure that continued independence. So we wholeheartedly support that concept.

We point out, however, that a statutory IG is not the only way to go. At the Department of Justice we have a very widely respected Office of Professional Responsibility. It is not created by statute. It works very well. So there are many ways to carry out your stated goal.

One other subject I would just like to touch on from a law enforcement perspective, and that is that presently there is no provision, when there is a violation of the NRC regulations or license conditions, to impose civil penalties against wrongdoers who are not NRC licensees. So if you have a situation where an employee causes the licensee to violate a regulation, we would all agree that such a person should be penalized. But there is not always evidence sufficient for or applicable to a criminal case. Presently, the vast majority of NRC employees are not licensees, including senior management. So if the president of a licensee causes the licensee to violate a regulation, we could not reach that person if we can't get the person by the criminal law—because there is no other type of penalty available to us to reach that person. Therefore, we would ask that you might also want to discuss that issue.

I would be delighted to answer any questions that you might have, Mr. Chairman.

Senator Breaux. Thank you very much for your testimony.

We had asked some of these questions to the Commission, but I wanted to get your views on it.

Does the Department of Justice initiate cases of criminal prosecution in this area, or do you wait for Office of Investigations to refer something that they think is a possible criminal violation?

Ms. Toensing. We await the referrals from the Office of Investigations. However, there could be a situation where we would get some anonymous tip or the FBI would get someone who would come to the Bureau and give an allegation of wrongdoing, so a case could come to us in that way.

Senator Breaux. The number of cases that the Chairman had indicated had been referred to the Department of Justice—how many do you know of that have been pursued from a criminal prosecution standpoint? I think he said something like 71 had been referred, and he thought maybe 10 had been prosecuted. Are those numbers about right?

Ms. Toensing. Yes, I think those numbers are about right. And that would be appropriate because we get the cases when they really haven't gone through an entire sophisticated investigative process. We get them when they're embryonic, so to speak, in many cases, and so we would then have to do the full investigation.

We would prefer that the referrals err on the side of "maybe it's not a case, but we'd better give it to the Department of Justice"—there may be some kind of situation where it doesn't appear to be a criminal violation, but is when as we get into it down the road. So we ask them to err on the side of sending us something that's just "iffy."

Senator Breaux. Does Justice have any problems with the current arrangement that has the Office of Investigations basically consulting with the NRC, with regard to the NRC having the ability to call off an investigation if they thought it needed to be called off? In other words, you feel that OI, which you depend on because you don't initiate cases, isn't in any way compromised by the current setup being within the NRC itself?

Ms. TOENSING. First, let me say that we have not encountered the NRC, the Commission, thwarting any investigation. But I believe in setting up processes because you never know who is going to be in power years from now. We should set up processes that would work best for a good many people who could be in a particular position.

So it's important to all of us to make sure that the independence of OI is there, whichever way somebody wants to do it. We don't want a situation where the Commission could stop investigations willy-nilly on no basis, just because they wanted to; I say that could be a dangerous situation.

Senator BREAUX. Well, you make a point that independence of OI is important. Can it be independent under the present setup, or is a second concept—i.e., an OI outside the NRC—necessary to preserve independence? Can it be independent the way it is?

Ms. TOENSING. Well, I think that it could be with certain—I don't want to get into the particulars of an agency that is not my agency, so I hesitate to get in to the middle of that. But I would just ask that the subcommittee and the Commission make provisions that ensure that independence, however you all want to work it out.

Senator BREAUX. A statutory outline of their responsibilities would, I would take it, in your opinion go a long way to providing that type of independence?

Ms. TOENSING. It could. But as I stated, I'm not wedded to any kind of statutory recommendations since the Department of Justice has an office which works very well and is very well respected for maintaining its independence.

Senator BREAUX. Can you share with the committee how other agencies in the Government operate with regard to the ability of that agency to pursue criminal investigations in-house as opposed to the NRC's inability to pursue it in-house but referring it to Justice? Like the SEC, for instance? Or like EPA?

Ms. TOENSING. Well, I was thinking of EPA when you were having the discussion earlier with the Commissioners about that, because EPA does rely on its own investigators since it has an arcane body of statutes and regulations. You need people who are versed in that subject and who work in it every single day to pick up the nuances of when there are violations.

I also happen to oversee all the Defense procurement fraud cases, and we have seen DCAA in the Department of Defense develop this kind of criminal investigative expertise in the last few years, because we had to have that. We couldn't have auditors who continue to go in and only look at whether the books were balanced correctly. We had to begin to educate them in the areas of fraud.

So I see the Government going in that direction where there's a certain expertise needed; ergo, the agencies have their own body of investigators.

Senator BREAUX. In practical terms I get the impression that that really is what OI does. They spot wrongdoing which is many times, if not all times, of a highly technical nature with all of the technical requirements and rules and regulations dealing with the nuclear industry. They basically package that up and say, "Here's the statutes; here's what's being done; here's why we think it's wrong," and they package up that file and send it down to the Department of Justice and say, "Here, go prosecute it."

Ms. TOENSING. But it isn't ready for prosecution at that point.

Senator BREAUX. I guess you would be recommending that they do more work with regard to the actual criminal preparation of that case?

Ms. TOENSING. I have some message coming to me.

All right. Let me just check on something.

[Pause.]

I wanted to clear that up. While the DOT attorneys say that it's not ready for prosecution, there are many times that OI does extensive investigation on certain cases, so they come to us at various stages. But they are not ready for prosecution, and that's my point. We still have to have the agency expertise somewhere for us to proceed and go into court on a criminal matter.

I'm sorry if I interrupted you.

Senator BREAUX. No, that's fine.

Senator Simpson?

Senator SIMPSON. Thank you, Mr. Chairman.

It's nice to see you this morning, Vicki. I've come to know you as a very capable and effective attorney, and also to know you personally and professionally, and I welcome you here. It's always a pleasure to see you.

Let me ask, does the Department support the establishment of an Inspector General for the NRC, really, with the responsibility of carrying out audits and investigations of employee misconduct?

Ms. TOENSING. Well, we can call it anything we want to. We support something that maintains its independence because there has to be somewhere that people can go if they think that a matter is not being handled properly.

Senator SIMPSON. In looking at that April transcript of Senator Glenn in preparation for this, I have the sense that there was quite a bit of animosity between the Department of Justice and the NRC, just my wild, silly hunch, and particularly right after Three Mile Island. Julian Greenspan, for example, a former Justice official, is extremely critical of the Commission; and yet your testimony, or at least what I gather, seems to suggest that there has been some substantial improvement since that time.

Are things improved today and operating in a way that you generally find to be satisfactory?

Ms. TOENSING. They have improved greatly, yes.

Senator SIMPSON. You are personally aware of that and you've seen it yourself, and are involved in it yourself?

Ms. TOENSING. That's right, Mr. Vice Chairman.

Senator SIMPSON. What?

Ms. TOENSING. That's correct.

Senator SIMPSON. You promise?

Ms. TOENSING. Yes.

Senator SIMPSON. Well, that's good, because Senator Glenn's bill, as you well know, would go beyond the conventional Inspector General concept and reassign an integral part of the Commission's programmatic responsibilities, the investigative function, to this independent office. Is that appropriate in your opinion, in view of the integral role of the investigative office in the Commission's health and safety program? And does the Department support that approach, or are there other ways to achieve the independence that we all agree is so important, but within the existing Commission structure?

Ms. Toensing. I'm not aware enough of the existing Commission structure to know what can be done. As I said, I don't want to get in the middle of how another agency is organized because I'd be the first to complain if somebody else were recommending statutes for how the Department of Justice should operate. I would just tell you that we need their independence established in whatever way the oversight committee and the Commission want to work out.

Senator Simpson. Well, thank you very much, Vicki. I appreciate that; you're very helpful, and I commend you for your work.

Senator Breaux. I thank the Senator. Let me just ask a follow-up question.

How many people at the Department of Justice in your area would be involved in looking over these types of potential criminal violations? OI has approximately 40, I guess, now. You can't have too many people over there who are specialists in criminal prosecution of nuclear violations, do you?

Ms. Toensing. Well, I have Mr. Shine here who is my expert in this, and he is my senior manager in this area. There are various attorneys who report to him, the way General Litigation is set up. We don't have teams of, say, people who only do one or two kinds of cases. We want to give our attorneys in this section, which has 75 percent of all the criminal laws in it, as much experience as possible.

So while Mr. Shine is in charge of this area, he will have any one of the 30-some attorneys assigned to the General Litigation section report to him on these matters. And several, of course, develop more expertise than others because they take a special interest in it.

If you like, I can find out how many are real experts. Every so often—because I've taken a great interest in this area—I will have all the attorneys who have an NRC case sit around the table and brief me on all these cases so they all hear each other's cases. I think that's important because sometimes we can see a pattern with different contractors or a pattern of investigative problems. Many times I'll have 8 or 9 attorneys sitting around the table to brief me on their one or two cases that they have.

Senator Breaux. I guess the point I'm trying to find out about is that it seems that the Department of Justice is very dependent on OI for any criminal prosecutions in this entire area of nuclear regulations and potential violations, in the sense the Department of Justice does not even initiate criminal prosecutions in this area unless you get it from OI. And I take it you have a lot of people looking at these cases that have been referred.

You only get a case if it comes from OI. The question I would ask now, OI has set up some standards within NRC as to what cases get referred to Department of Justice. So if those standards down at the bottom are defective, your prosecution is going to be defective because you're never going to get the case. If you don't initiate them, you're only going to get what they send you; and if they ha. the wrong reasons for sending them, something's wrong.

So my question is, are you satisfied with what the Commission members said were their reasons for initiating an OI investigation? Or should it be broader? Should it be changed? Is it functioning?

Ms. TOENSING. Let me just check a minute.

[Pause.]

I wanted to make sure where we were in our MOU negotiations. I think the only point is the issue that I was aware of. Sometimes—and we haven't gotten this hammered out yet—and that is the conflict when there is a criminal matter and a health and safety matter. We haven't quite gotten the wording worked out. We agree wholeheartedly that if the plant's going to blow up, it had better be closed, and the criminal matter takes the back seat. But sometimes we get the feeling that the plant is only losing money because it's closed but that the criminal matter should also take a back seat, and we don't feel that that's the time to do that.

We are working on it. As I say, there is now good communication.

Mr. Chairman, I do have a concept, though, about your concept of the Department of Justice initiating investigations. We really don't do that. For example, on drug cases it is the DEA that goes out and initiates cases, and the Department of Justice, as for Main Justice where you have your prosecutors—we may coordinate areas, but we have our agencies go out and initiate the cases. Lawyers don't do that.

Senator BREAUX. I understand that. But I take it that in this area, the FBI does not make a lot of independent investigations in this area unless the Office of Investigations really calls it to their attention, or unless you have a whistle-blower within Operations, I guess.

Ms. TOENSING. With all great deference to my friends at the FBI, whom I work with on terrorism and bank fraud and many other areas where they are superb, they really do not have the expertise to do these kinds of cases.

Senator BREAUX. All right. We very much appreciate it. We may have some additional questions that we could submit to Justice, and would hope that you could respond to them in a timely fashion. We appreciate very much your being with us. Thank you.

Ms. TOENSING. We'd be delighted. Thank you.

Senator SIMPSON. Thank you, Vicki.

Senator BREAUX. Our next two witnesses are Ben Hayes, Director, Office of Investigations of the NRC, and Vic Stello, who is Executive Director for Operations with in the NRC. Gentlemen, we are pleased to have you here.

Mr. Stello, we have you on the list first; do you want to go ahead and present your statement?

STATEMENT OF VICTOR STELLO, JR., EXECUTIVE DIRECTOR FOR OPERATIONS, NUCLEAR REGULATORY COMMISSION

Mr. **Stello**. Yes, Mr. Chairman. If I may, I would ask that my statement that I submitted be entered in the record, and I would only briefly summarize the points that I think are important based on the testimony I've heard.

Senator **Breaux**. That would be appropriate.

Mr. **Stello**. I wanted to begin by making a point, a contrast between the two offices—the office that we've been talking about this morning, the Office of Investigations, and the Office of Inspector and Auditor, which we'll be talking about this afternoon.

The activities of those two offices are very, very different. The OIA does a variety of things, including investigating wrongdoing of the staff itself; and the need for that office to be completely separate and independent and isolated from the staff is clear. On the other hand, the Office of Investigations performs a service to the decisionmakers within the agency to provide very important and factual information that is necessary for us to perform our one and only function, safety. Just as our technical experts go out and inspect equipment or our experts in human factors go out and try to understand management and people, the Office of Investigations has the unique task of using investigators to go out and pursue wrongdoing. And when they do those investigations, they provide us with the information that's very helpful in that it tells us of wrongdoing, but it also gives us insights as to how the particular company is working. And if it's not working very well, not being managed very well, that by itself is a significant safety problem and has led to the shutdown of many plants because of problems like that.

So the need for a very close working relationship between OI and the staff is very, very real. OI cannot do their job without the staff, and the staff could not fulfill its mission without the benefit of the investigators. They have unique skills and, in order to understand the complex regulation, they have to have the expertise of the staff to do that. On the other hand, the staff needs the expertise of the skilled investigators to truly understand the nature of any wrongdoing, should it go on.

There are a variety of ways, and you've heard some of them this morning, as to how to organize to do that. I, for one, believe that any organization—any arrangement of blocks and squares that you put on a piece of paper by themselves tell you one story, but it's the people and the commitment of the people to work together, to do the responsible thing to get the job done. Some organizational structures are helpful because they allow you to work more efficiently. Certain management theories might tell you to do one thing or another; public perception might tell you to do something else. But it is the people that are charged with the responsibility to work together.

Mr. Hayes and I—at least, I'll start by speaking for myself—over the past several months, and I made the commitment in the Glenn hearing that I would do everything that I could to try to improve relationships. I think I'm doing that. I will speak for myself: I think our relationship is improving significantly. We have frequent discussions in looking at and exploring new ways to try to understand problems of facilities. Mr. Hayes is very responsive to any requests that I make. When I tell him I need investigators to pursue a problem, he does so, and makes the commitment to me to do it and does it quickly. The relationship as I see it right now has improved over the past several months quite a bit. I won't be satisfied until we can make it perfect, and that will probably be never. I'm sure we will have debates and arguments; I think they're fine and you ought to have those.

With respect to one particular issue, however, combining the offices of OI and OIA, I feel very, very deeply about it. It's my view that if the Congress takes that action, I think the net result of that action will be to make our nuclear plants less safe. I say so because I am firmly convinced that having that kind of an activity set up won't allow the very, very close working relationship between the investigators and the technical staff to do the job. I feel deeply about that and would urge that Congress look very, very carefully at the impact of taking such a step because it can have an untoward effect toward safety, and I don't believe that's in the interest of the public or the Congress or our Agency.

That, Mr. Chairman, concludes what I have to say, and I am prepared to answer any questions you may have.

Senator **Breaux**. Thank you very much, Mr. Stello.

Mr. Hayes?

STATEMENT OF BEN B. HAYES, DIRECTOR, OFFICE OF INVESTIGATIONS, NUCLEAR REGULATORY COMMISSION

Mr. **Hayes**. Thank you, Mr. Chairman.

Rather than take the committee's time I, too, would submit my prepared testimony to the committee and ask that it be inserted into the record.

In the previous discussion of this morning, many of the issues surfaced by the subcommittee are certainly of interest to me personally and to my staff, and it appears as though you have in fact focused on some of the significant questions that are before my office and the Commission.

I would like to make one comment, and it's just a sense that I had in listening to the discussion this morning, and that is that my personal view concerning criminal misconduct is that it is in fact a health and safety question of a large magnitude, in my view. Those individuals who take it upon themselves—or group of individuals—who willfully and intentionally violate the health and safety rules of this Commission present, in my view, a significant health and safety question. And my function, as has been stated today, is to ferret out those individuals and to develop the facts and the record so that the Commission's decision-makers can take appropriate action. Part of that action, as has previously been stated, is referral to the Department of Justice. In my view, the Government's attorneys—the Government's prosecutors—are an extension of the Commission's enforcement program, and I view my effort, as small as it may be, less than 2 percent of the Commission's resources, to provide that data to Mr. Stello and his staff and to the Commission, to assess that data and determine whether or not the Department of

Justice should look at it for criminal considerations. To me, that is the function of my office, and we work very hard to provide that kind of credible data to the staff and the Department and anyone else who has a call in the area of public health and safety.

I view that a criminal prosecution extends to the Commission the deterrent effect that I think we desperately need in this country, so that others within the industry will get a strong signal that this Commission will not, and this Government will not, tolerate willful noncompliance with health and safety regulations. We have many, many cases going where the allegation is obviously a willful violation, so that is my contribution.

I think also that the product that we produce, hopefully, increases the credibility of the Commission in the public's view and in the Congress' view. I feel very strongly that we must recognize how the Congress views us, as well as the public. But I think anything that I personally and my staff can do to assist the Commission to make a more informed decision increases that credibility and sends a strong message to the industry that we are legally bound to regulate.

I am ready to answer any questions, Mr. Chairman.

Senator **Breaux**. Thank you both for summarizing your testimony. I appreciate it, and we'll proceed to questions.

Mr. Stello, I commended Chairman Zech for his statements where he outlined a number of significant changes that had been made in April with regard to some of the procedures. One of the changes that I commended him for was a decision not to extend the life of the Investigations Referral Board, which this committee, I think, had almost universally criticized.

But, lo and behold, am I to find that we now have a new board called the Investigations Priority Review Group? What the heck does that do?

Mr. **Stello**. One of the significant findings we got from the original group was that because of the inequity of priority of cases among our regional offices—many of the requests for investigations come from those five regional offices—we felt we needed to have a way in which to look from a national perspective or a headquarters perspective, a way to ensure that the resources were going to where our high-priority needs were.

I recommended to the Commission, and they concurred, that the IRB be canceled, and that in its place we perform this function. We have met with Mr. Hayes, who has agreed to participate directly on this board, and I believe I can speak for him as well. He shares the need to go back periodically and make the assessment to assure that the resources are being used for those cases for which the need is greatest.

We have organized that group and I understand that shortly they will be having their first meeting to undertake that action. I believe it is very, very important for us from time to time to examine whether or not our resources are being put on those cases for which the safety benefit is the greatest, and that's its purpose.

Senator **Breaux**. But with all due respect, that was the same thing you folks told us about why we needed the first board. How does this board differ in its functions from the board that was disbanded; which we criticized as being a step that gave the NRC more authority than some thought was necessary with regard to investigations of wrongdoing?

Mr. **Stello**. This board will look at investigations that are already initiated, after the fact. It will not be in the process of looking at investigations when they are being requested, but rather looking at those existing investigations that are ongoing and those that are not ongoing because of lack of resources, and making a decision as to whether to adjust resources for the existing cases.

Senator **Breaux**. Why should the NRC or your shop be involved in telling this shop, after they've already made a decision to investigate something, that they're not doing it in the right priority? Is that what you're telling us?

Mr. **Stello**. Well, I think Mr. Hayes relies very heavily on the staff giving him the priority for the cases. It is the staff judgment as to the seriousness of the issue, and if they relate to other information that we have from our inspection process that indicates that we have a need for that information on a high-priority basis.

Senator **Breaux**. Mr. Hayes, do you want to comment on the differences between the old board and the new operation?

Mr. **Hayes**. Yes, sir. The old IRB, as it was called, was—in my view, Senator—for looking at the propriety of whether or not a matter should be referred to OI. In my experience, I don't think that has ever been a problem. It was not a problem, and I attempted to document, over the history of the investigative program, those referrals from the various Regional Administrators that the staff generically felt was inappropriate; because if they were in fact inappropriate, then I wasn't doing my job if I accepted them for investigation. And I couldn't identify any.

On the other hand, the role that is now being played—that is, the establishment of a national priority of matters already under my purview—I have always supported. As a matter of fact, if you look at the record, when Bill Dircks was the EDO, I was the instigator—Bill and I together—of recommending to the Regional Administrators that on a 30-day basis they sit down with my staff and establish a regional priority. And I, and Bill in concert, would establish a national priority where there were conflicts. In fact, I think there's a paper out on that suggesting that if there is a conflict, raise it to Ben Hayes and the EDO and it will be resolved.

Going back to my opening remarks, Mr. Chairman, my role is to provide data. And in the case of—I think Chairman Zech mentioned the PECO investigation. We worked a straight 72 hours over the weekend to get the data necessary so that the staff could take an immediate health and safety action. I've never quarrelled with the staff in terms of working with them and establishing priorities. My quarrel was in trying to—I'll use the word "thwart"—matters coming to our attention. I think I should be given the opportunity to look at those allegations and make that independent assessment.

Senator **Breaux**. How many cases do you have currently pending before OI, ball park figure?

Mr. **Hayes**. I can give you an estimate. I would say we have anywhere from 75 to 100 cases open at any given time, Mr. Chairman.

Senator **Breaux**. And is that number so large that it takes another review panel to set the priorities in there? Can't you and your 40 folks say, "Look, we have so many people; here are the cases that have been sent to us or that we've initiated; here's the ones we think have the highest problem, as far as potential wrongdoing, and we're going after this, 1 through 75"—do we have to have another one? We've got so many—I can't keep track of the alphabet soup we've got up here. We eliminate one and you put another one back in. I just don't see the need for having another board or panel to help you rank how you ought to do your job. Can't you do that by yourself, with your folks?

Mr. HAYES. Well, we have—in the past, prior to the panels, we did establish the priorities with the various senior executives in the regional offices. And to my knowledge, at no time was there a conflict in that priority-setting schedule that I'm aware of, Senator. But on the other hand, I think there has to be a mechanism to set priorities.

Senator BREAUX. How do your two shops settle any differences between evidence of wrongdoing versus evidence of a safety violation? I think, Mr. Stello, in your testimony you gave examples of the staff and OI working well now, that the procedures are being improved, but we understand that in the past your staff has had to delay some of your regulatory operations while OI has pursued a wrongdoing of a criminal nature. How have we resolved that? What type of problems did you have?

Mr. STELLO. Well, let me speak first to the point of when it comes to an issue of needing to take a safety action, we take that action. There's no question. We have discussed this with the Department of Justice and they concur fully, that when we make the judgment that an action is needed and we have to proceed to take that action, it is all right by them for us to do that.

As you are well aware, an investigative process—Mr. Hayes, his investigations—they take time. In order to take—not an immediate health and safety action, but a corrective regulatory action, there may be particular individuals in an organization for which the investigation is suggesting wrongdoing, and we would want to take corrective action in a civil matter. We have the authority, for example, to order any licensee to remove anyone from their staff in which we do not have confidence that they are going to do their job correctly because of potential for wrongdoing.

Now, in order to be able to do that we have to have the results of Mr. Hayes investigation, so that takes some time. He makes the judgment himself to refer that to the Department of Justice; of course, that process takes time in itself, as well. And that means that we may not be able to take corrective action for a considerable period of time, and if a facility is shut down, now you have the competing problem of public interest. These facilities are producing a particular benefit to the public; in the case of a nuclear facility, electricity, for sure. And if we can't take the action that's necessary, then we may not be able to find an easy way, a more direct way, as we would like to be able to take the action that we think is appropriate to allow a restart. The facility is shut down; we're satisfied with safety, but we may have to wait a considerable length of time until the investigative process is over before we can devise a suitable mechanism or enforcement action which would allow us to be persuaded that it was okay to start it up again.

We do that with, I suggest, great difficulty. There is a competing problem of being responsible in taking an action that's unnecessary because the public, after all, is being affected by our action. Shutting down a nuclear facility is indeed a burden to the public; ratepayers generally, in most parts of the country, have to pay more for their electricity. So we have at least, in regulating in the public interest, that kind of a concern, and it's a difficult issue to face. We have so far been able to find a way to work around that problem. Mr. Hayes and I discuss that frequently to make sure that we can get investigations done so that we can take the action from a regulatory point of view as efficiently as we can. But it's difficult.

Mr. **Hayes**. Mr. Breaux, if I can be more responsive to your question about your current inventory, my staff has provided me with the figures as of August 31st.

We had currently open in our inventory 130 investigations. We were not working 57 of those investigations because we didn't have the investigators to assign to them, and we have closed to date 36 alleged wrongdoing matters for lack of resources.

Senator **Breaux**. I have one follow-up question.

You talked about the cost of shutting down a plant, and we all know that's expensive. But if it's a question of health and safety, you don't balance out the cost of closing the plant?

Mr. **Stello**. It's not even considered. There's no reservation. The response I gave to you was that after we have done that and the investigation is ongoing, we need those results to decide what action is appropriate to allow it to restart. And that's when the investigative process is very long and the case may be referred to Justice, and if it's particular individuals, we may not be able to identify those individuals to take appropriate action. Hence, it is difficult to initiate the regulatory action to allow restart. Never is there any consideration at all of the cost of shutting it down.

Senator **Breaux**. Would you order a restart prior to the criminal prosecution being completed, if there were any involved?

Mr. **Stello**. We have permitted restart and taken compensatory measures, without getting into specific examples of ongoing cases where we've been able to do that and not identify the individuals or in any way interfere with Justice's case. We're trying very carefully to make sure we don't do that.

Senator **Breaux**. But that would present a problem to your office, Mr. Hayes?

Mr. **Hayes**. What we attempt to do, Mr. Chairman, is work with the staff to minimize as best we can, in cooperation with the Department of Justice, any disclosure to our prospective defendants of data that might thwart or have an adverse impact on any criminal proceedings that the Department of Justice may wish to undertake. I think Ms. Toensing mentioned that in the past we have been able to try to mediate and try to allow both agencies to fulfill their statutory requirements.

In the last few months of this year there are some changes made which make my job a lot easier, if you will.

Senator **Breaux**. Senator Simpson?

Senator **Simpson**. Thank you, Mr. Chairman.

Welcome to the subcommittee. It's a pleasure to see you again.

I'd ask Mr. Stello—Victor, are there instances where the potential exists for conflict between the action that might be appropriate from your standpoint to protect the public health and safety, and from Ben Hayes' standpoint to pursue criminal wrongdoing? And if so, give me some examples of this potential conflict and how those differences should be reconciled, in your view.

Mr. STELLO. The differences are generally along the lines I've already been outlining; that is, the appropriate regulatory action to take to correct the problem to allow a facility to restart. Mr. Hayes—we have very close working relationships—will know particular individuals, and I'm thinking of a specific case; I'll need to check if I can mention it, but I think we could do without mentioning it today—where particular individuals are known to us to be untrustworthy.

Now, if we could go in and just direct the licensee, pending the completion of that investigation, to remove those individuals and put them aside, we would have been able to allow the restart of the facility, given that we could have put those individuals aside.

Now, in order to do that, it obviously could interfere with Mr. Hayes' investigation and, further down the line, clearly be a problem for the Department of Justice. They would not want us to do that. So it becomes much more difficult then, and the regulatory action can be delayed significantly in terms of deciding on what basis we can allow a facility to restart when we have that kind of a conflict.

Senator SIMPSON. Do you have any objection to the current reporting relationship of the Office of Investigations reporting directly to the Commission?

Mr. STELLO. At the moment—I've already answered that earlier when I said that I think that in any organizational structure, the people are the more important part, not the arrangement of the blocks or the squares. When this organizational setup was started I objected strenuously to the Commission because I believed that the investigative efforts are very, very much a real part of what the staff needs to have as information, just as we need technical experts who can go in and look at the structural aspects or the instrumentation aspects or human factors or management. I believe that kind of a close working relationship in the regulatory process for investigators is important, and I told the Commission that I didn't think they should have elevated the office.

Now that it's there and we have the perceptual problem that we have, I would not want to disturb it because I think we can make this organization work, and I'm committed to making the current organizational structure work. But as I said earlier, I am concerned that any further changes which could cause further isolation of the investigative process with the regulatory staff would be detrimental to the public health and safety, in my view.

Senator SIMPSON. Do you have any objection to the current procedures for identifying these cases that are to be investigated, or referring these cases to OI for prioritizing the investigative workload?

Mr. STELLO. I don't have any problem except for the last one, where I do believe we have to visit more carefully the issue of prioritizing. As Mr. Hayes has indicated, they are not working on all of the cases that are pending. We may find a need to have the priorities shifted, to have some of those cases worked. I think we need to have that discussion. I am satisfied that a mechanism for that discussion is now in place, and I think that as soon as it starts to work that particular issue will be adequately addressed, as well.

Senator SIMPSON. A couple of questions of Mr. Hayes.

Part of your testimony puzzles me some; particularly in view of the letter to Senator Glenn which was attached to your testimony supporting the establishment of an investigative program outside of and independent from the Commission.

Do I understand you correctly to say that your existing authority—that is, the procedures and policies that govern your activities—are sufficient to allow you to carry out your responsibilities in an adequate matter? In other words, are you satisfied with the current arrangement, that it should not change, or what?

Mr. HAYES. Most recently, Senator, especially after the hearings earlier this year, the Commission took some action and gave me additional authority to fulfill what I perceived my responsibility to be. And in addition, and because we self-initiated a case, that the staff's position was that they didn't need the case worked for regulatory need, yet I felt we did—we self-initiated, and I was challenged very directly by a Commissioner in no uncertain terms. I responded to the Commission as to why I thought it necessary that we self-initiate this case, notwithstanding the staff's view that they didn't feel it was appropriate.

The particular SECY paper referred to earlier today basically says "an allegation of wrongdoing," and the staff says, "we need it for regulatory purposes." So I wrote a paper to the Commission to clarify my authorities and responsibilities. I sent it to the Commission. I had a closed Commission meeting with the Commission, and it's my understanding that notwithstanding the staff's position, that the Commission supports the self-initiation authority that rests with my office.

So with that sort of under my belt, Mr. Simpson, as long as the Commission—at least, as long as a majority of the Commission—supports that, then the authorities and the responsibilities stay intact. But as has been said today, Commissioners come and go, and I am trying to look in a long-term fashion—when there is no more Ben Hayes here, down the road—at what I think is best for the American people and the protection of public health and safety. That's what I'm looking for.

Senator SIMPSON. In view of the changes that have been made recently, is there still a need for the approach that would be taken under the Glenn bill?

Mr. HAYES. I think the discussion today about putting in statute, putting it in a solid, permanent fashion, the responsibilities and authorities is appropriate. I obviously support Senator Glenn's bill; that was presented to me, and I think that is the way to do that. The Department of Justice, as you have heard, has said, "Well, there are other ways." As it stands now, I have not been given any alternative but to support S. 908. And to me, in the long run, absent a viable alternative, I feel I've got to support that.

Senator SIMPSON. Well, if all of this is a concern, and it is, would your fears be allayed by simply codifying the status quo in legislation, first providing this statutory underpinning—I asked this question before of another—providing a statutory underpinning for OI much like we've done for the Office of Nuclear Reactor Regulation, then providing that OI report directly to the Commission?

Mr. HAYES. If that process incorporated the guarantees of the Inspector General to the extent that, in my view, an IG bill does, whether we are called an IG or a statutory body would be immaterial to me. I am looking, Mr. Simpson, at something more permanent than a 3-2 vote.

Senator SIMPSON. I get the impression that some of the controversy here comes from two rather critical memoranda that Commissioner Roberts sent regarding your office, and that much of the debate centers around suggestions there—including reporting, relationships, ability to self-initiate, definition of character investigation—but that was rejected by a majority of the Commission.

How much guerilla warfare is still going on at the Commission as a result of this longstanding tension between you and Commissioner Roberts' office?

Mr. HAYES. I am pleased to say, Commissioner, that recently——

Senator SIMPSON. God, don't get me in there. [Laughter.]

I want the record to clearly reflect that. [Laughter.]

Mr. HAYES. I have not received from Mr. Roberts' office any additional memoranda.

Senator SIMPSON. Is that all you're going to say?

Mr. HAYES. That's about it.

Senator SIMPSON. But it's still red hot and a lot of fun over there, isn't it? It wastes a lot of time? Doesn't it waste a lot of time, fiddling around like that?

Mr. HAYES. You know, Senator, you've placed me in a very difficult position. I work for those five gentlemen——

Senator SIMPSON. I know you do.

Mr. HAYES [continuing]. And I sit up here——

Senator SIMPSON. Wouldn't it be easier to work for one? That's a terrible question to ask, isn't it?

Mr. HAYES. Yes, sir, it is.

Senator SIMPSON. Well, don't answer it.

Mr. HAYES. You know, I'm just a fly on the elephant's rear here. You know, we have a very small piece of the action, if you will.

But let me say, we have not engaged in any more memorandum writing back and forth, and I'm very pleased with that.

Senator SIMPSON. I'm sorry, Mr. Chairman, I have to head back to the floor.

I appreciate very much the opportunity to question, and I thank you.

Senator BREAUX. Thank you, Senator.

Mr. Hayes—this is a follow-up to what Senator Simpson has been getting into—you pointed out that you recently approached the Commission to request revalidation of the basic 27 policy statements, and you say the Commission did so, but "the meeting reemphasized the need to ensure that the basic investigative authorities of OI are given some degree of permanence, or at least stability, if OI is to continue to contribute effectively to NRC's safety mission."

My question is, apparently you're still saying that we need to establish your authority clearly to initiate investigations. I'm wondering whether events prior to that meeting are the reason you say we need to clearly establish your authority, or the events in that meeting. I mean, did you come away from the meeting confident that now you have been clearly established by the NRC Commissioners that you have the authority to initiate investigations?

Mr. **Hayes**. I think a majority of the Commission supports that, but that is not in agreement with the current SECY-85-369 paper that was referred to.

Senator **Breaux**. Why not?

Mr. **Hayes**. That paper sets forth two criteria, if I'm not mistaken: "alleged wrongdoing," and "staff determines an investigation is needed for enforcement purposes." I've got issues that I have felt needed to be investigated——

Senator **Breaux**. Like what? What were the areas?

Mr. **Hayes**. One that I think Commissioner Bernthal touched upon just briefly—and if I may, while I don't wish to read the case because it is currently pending at the Department of Justice—"In this instant case, it was obvious there was wrongdoing. What was not obvious was whether it had been adequately addressed. The principal question is the extent and documentation of wrongdoing. For instance, the inspection report contained only a one-sentence reference to record falsification. We have been informed that no other documentation exists to support the assertion that the records were falsified. No statements were taken. No reports of interview were written. No copies of the alleged false documents were obtained, nor the alleged perpetrators identified. We understand the inspector's notes were destroyed, and the staff presented to that to us and gave us a charge to look at it for referral."

Well, I'd be out of my mind, Senator, if I wanted to refer an empty shoe box to the Department of Justice. And at that time, the Commission's policy was that on false documents, Title 18001, I had to get the views of General Counsel, which I no longer do. I don't think General Counsel would have been supportive of that.

Senator **Breaux**. Can you tell us what you were reading from?

Mr. **Hayes**. This is a document that I submitted to the Commission dated March 20, 1987, in response to the Commission's request—it stems from Commissioner Roberts' queries on various cases around the country, that we took the initiative and did what we thought was right and self-initiated. I would like to bring out the justification for that action.

Senator **Breaux**. Is there any reason we should not make that part of our record?

Mr. **Hayes**. This particular case, after we had concluded our investigation—we have referred it to the Department. It is currently under criminal review by the Department. If the committee is desirous, I can go through this memorandum and excerpt material that I don't think would be appropriate in the public arena and submit it to the committee.

Senator **Breaux**. Well, obviously, the committee has no desire to interfere with any ongoing criminal investigation. It's not proper, and it's probably not legal anyway. But I think what you have and what you have said is important, and perhaps you can work with our staff and let them review what you have rather than making it part of the committee hearings.

Mr. **Hayes**. Certainly, Mr. Chairman.

Senator **Breaux**. Now, give me your understanding of the current situation with regard to your authority to initiate investigations. Is it limited to investigations that are needed for the purpose of future regulatory action?

Mr. **Hayes**. I don't know what you mean by "future regulatory action."

After the meeting with the Commission, in response to SECY-87-93 that I sent to the Commission where I asked them to revalidate my authorities and responsibilities, in that discussion with the Commission a majority of the Commission made it very clear that the Director of the Office of Investigations can self-initiate, notwithstanding the staff's position on any given case.

Senator **Breaux**. Is that your current authority with regard to initiation of investigations?

Mr. **Hayes**. That is correct.

Senator **Breaux**. And that does not tie your authority to having to go to them to see if this investigation in any way is related to future regulatory actions by the Commission itself?

Mr. **Hayes**. That's correct, Mr. Chairman.

Senator **Breaux**. In your testimony, Mr. Hayes, you talk about your support for S. 908 even more now that it has been amended, and you further point out that you "believe the most compelling arguments in support of S. 908 can be found not only in the committee report, but in my testimony so for today." My understanding of the committee report is that the examples and the discussions continued in it were about defects in the Office of Inspector and Auditor, OIA, not in the procedures established for the Office of Investigations, OI, your show. I don't see how anything they said in the committee report relates to why your office is in need of supporting major changes.

Mr. **Hayes**. Well, I want to be very careful here, Mr. Chairman, because one of the three cases cited or appended in that committee report—namely, the matter dealing with Commissioner Roberts—I believe is currently under criminal investigation by the FBI.

Senator **Breaux**. It was also an OIA case initially, wasn't it?

Mr. **Hayes**. No, sir, it was not. It was not, and that is my concern, Mr. Chairman. An issue arose; I took it to the Commission, and I was given orders in writing to do certain things. And I fulfilled that obligation, I thought, that the Commission——

Senator **Breaux**. I don't want to get into the details, but isn't something dealing with a Commission member an OIA area of jurisdiction as opposed to an OI jurisdiction?

Mr. **Hayes**. Yes, sir, Mr. Chairman, that's correct.

Senator **Breaux**. So why were you involved in it?

Mr. **Hayes**. Well, we surfaced the matter to the Chairman, and I was directed—well, let's put it this way. I was not directed to take it to OIA, but to take the matter to Commissioner Roberts instead.

Senator **Breaux**. Well, if you stumble across something that is possibly an internal wrongdoing, no matter what it is or who it involves, as an investigator wouldn't you perceive your duty to say, "I ought to take it to the person who is supposed to investigate this," in this case OIA?

Mr. HAYES. Yes, sir.

Senator BREAUX. But you didn't do that?

Mr. HAYES. No, I took it to the Chairman.

Senator BREAUX. Could you tell us why?

Mr. HAYES. I took it to the Chairman because the particular incident was a fellow Commissioner. And I made a recommendation to the Chairman that the matter be directed to OIA, but that was eventually not my instructions from the Chairman.

Senator BREAUX. Did you feel that you didn't have the authority to direct it to OIA yourself, that your responsibility was to let the Chairman dispose of it by whatever was proper and legal under the existing rules?

Mr. HAYES. Well, in this particular instance, I always had the avenue of taking it directly to OIA. I mean, any employee in the Commission can do this. But in this instance, since it involved a fellow Commissioner, I thought that certainly a discussion with the Chairman of the NRC was appropriate. I made my recommendation to the Chairman, and the facts will just have to speak for themselves as to what happened afterwards.

Senator BREAUX. Well, when you made that point—I'll get Mr. Stello to comment on this—when you made the point that your office had found something that you thought you might have some problems with and it was not within your jurisdiction, you took it to the Commission, what did the Chairman tell you to do with it?

Mr. HAYES. Basically, take it to Commissioner Roberts. And not "basically;" in fact, to do that.

Senator BREAUX. Obviously this tells me there's a major defect somewhere out there. If Jack has a problem with something that Joe is doing, I don't think you take it to Joe and ask Joe to investigate it, do you?

Mr. HAYES. Well, I'm a little hesitant about getting too much into detail, Mr. Chairman. As you know, Mr. Dave Williams is looking, I believe—that's one of the issues or areas that he's looking at. The matter is under criminal investigation. I'm a witness in that case. The FBI has visited me, and I'd prefer to limit my comments to what is on the public record and not to get into detail.

Senator BREAUX. I'll let the facts speak for themselves. I don't mean to try to drag you into something that's not suitable for this hearing.

Mr. Stello, did you have a comment?

Mr. STELLO. I only wanted to clarify that we do have a manual chapter, that any wrongdoing by any member of the staff, the manual chapter makes clear that you are to report that to OIA.

Senator BREAUX. We want to thank both of you gentlemen. We probably have some follow-up questions that we may need to get into, and we'll just submit those to both you gentlemen. We appreciate your being with us. Thank you.

Mr. STELLO. Thank you very much.

Mr. HAYES. Thank you.

Senator BREAUX. Let me make an announcement for the purpose of the people in the room. I think the time posted for reconvening this afternoon is 1:30. It will probably be right around 2:00; maybe five minutes to 2:00, but not before that. The committee will stand in recess until then.

[Whereupon, at 11:58 a.m., the subcommittee recessed, to reconvene at 2:00 p.m. the same day.]

[Statements and other material submitted for the record follow:]

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

July 1, 1987

MEMORANDUM FOR: Chairman Zech

FROM: William C. Parler William Parler
General Counsel

SUBJECT: STAFF REQUIREMENTS MEMORANDUM--MANAGEMENT MEETING OF APRIL 14, 1987, ITEMS 8 AND 9

This is to inform you that no changes to official Commission documents are necessary in order to implement the Commission's decision to remove the mandatory requirements that OI consult with OGC prior to referring a matter to DOJ and that OI consult with the Commission prior to referring material false statement issues to DOJ. This is because these requirements were announced as Commission guidelines in a memorandum of August 14, 1985 from Samuel J. Chilk to Sharon Connelly and Ben Hayes which is superseded by the subsequent staff requirements memorandum of April 20, 1987. A search by OGC and OI has not revealed any other documents in which these guidelines appear.

cc: Secretary Chilk
Commissioner Roberts
Commissioner Bernthal
Commissioner Carr
Ben Hayes
Victor Stello, Jr.

Contact:
E. Neil Jensen, OGC
x41493

CHAIRMAN

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

March 24, 1987

COMLZ-87-6

MEMORANDUM FOR: Ben B. Hayes, Director
Office of Investigations

FROM: Lando W. Zech, Jr. Lando W. Zech Jr.

SUBJECT: OI INVESTIGATIVE PROCEDURES MANUAL

The Commission has approved the revised OI Procedures Manual subject to the following:

1. **In section 3.3.6 of the proposed manual, the language "except at the direction of OI:HQ" should be deleted.**
2. Policy 24 should be revised to indicate that when a safety question requires prompt attention, OI must, rather than may, have other NRC officials review and comment on the pertinent portions of the report.
3. Add clarifying language to Policy 13 to distinguish the OI and OIA responsibilities on referrals to the Department of Justice.
4. Modify section 4.5, as originally suggested by Commissioner Roberts, to indicate that investigators do not have the authority to exclude third parties from interviews.
5. Section 3.3.5 should be revised to use the words approved by the majority of the Commissioners for deciding when a reasonable basis exists for believing wrongdoing is involved. (See COMTR-86-8 dated November 19, 1986.)
6. Section 4.6 should be modified to cover the situation in which an interviewee insists on taping, or receiving a tape of, the interview as a condition of being interviewed.
7. The Policies 7, 11, 25, and 26, relate to matters that are more appropriately addressed in the NRC Manual or policies governing the other NRC offices. They should be revised accordingly.

8. Changes are needed to account for new or revised Commission policies and practices that have become effective since the manual was first submitted in late 1985. For example, pages 1-4 and 3-5 should reflect the new OI Policy 27 on character and integrity investigations approved by the Commission in November 1986. Policy 7 on page 3-1 should be tailored to the Commission's Statement of Policy on Confidentiality. The definition of "wrongdoing" on page 1-4 should conform to the definition adopted by the Commission in early 1986 in approving policies on thresholds and priorities for investigation.

9. In several places (e.g., pages 1-4 and 3-7) the manual should be revised to ensure that the OI manual is consistent with the guidance in NRC Manual Chapter 0517 because MC 0517 is intended to apply to all NRC employees in their handling of safety allegations. The confidentiality form (Appendix R) in chapter 7 of OI's manual, received in November 1986, should be replaced with the standard form to be used by the rest of the agency under MC 0517.

10. Page 3-1 of the manual states that OI Policy 6 is pending before the Commission. That policy apparently concerns individual rights during an OI investigation. The Commission approved 3 basic guidelines in this area on May 21, 1985 (SECY-85-80). If they constitute Policy 6, they should be so identified; if not, we should be provided a proposed Policy 6 for approval before the manual is published.

11. The manual at page 4-6 suggests that transcription of interviews is to be merely considered where OI has subpoenaed a witness. Transcription ought to be the general rule under such circumstances: if the agency has been required to go to the trouble of subpoenaing a witness, the testimony is important and the agency would want a direct and accurate record of it rather than have to rely on an account later written by the investigator. Such a practice is also in keeping with the spirit if not the letter of the Administrative Procedure Act's dictate that a person compelled to submit data or evidence before an agency is "entitled to ... procure a copy or transcript thereof...." 5 U.S.C. 555(c).

12. The Commission does not object to OGC's suggested editorial changes in its memorandum of November 26, 1986, on OI's chapter 7 on confidentiality. However, OGC's memo suggests other changes, and it is not clear whether OGC and OI have resolved those comments. OGC and OI should resolve them and report back to the Commission within 2 weeks so that the Commission can give final approval to chapter 7. OGC and OI should coordinate with the EDO to ensure any further revisions are consistent with MC 0517 and staff practices.

13. Where possible, the Commission has suggested specific language reflecting the above comments in the attached mark-up in order to avoid continued exchanges between the Commission and OI on the content of the manual. However, to the extent that some matters (such as the content of Policy 6) may require further Commission review, OI should provide us with specific proposals to reflect Commission views within the next 2-4 weeks so that the manual can be approved and issued.

cc: Commissioner Roberts
Commissioner Asselstine
Commissioner Bernthal
Commissioner Carr
OGC
EDO
OCA
SECY

1.4.6. Transmittal Sheet for Manual Changes. A changed page (or pages) and added material are transmitted to all manual holders with a transmittal sheet that is to be retained in a manual file. The transmittal sheet is illustrated in Appendix C.

1.4.7. Filing and Maintenance. Manual changes specified in the transmittal sheets are to be made immediately and the transmittal sheets are to be kept for future reference for checking completeness of the Manual. Replaced Manual pages are to be discarded.

1.5. Explanation of Terms

a. Policy--This term as used in the manual refers to the ~~26~~ 27 basic investigative policies which have been approved by the Commission (see paragraph 3.1.).

b. Procedures--The guidelines and instructions for implementation of the basic OI policies approved by the Commission.

c. NRC Requirement--This term as used in this manual will refer to NRC regulations, appropriate statutory provisions, license conditions, technical specifications, orders, or any other regulatory requirement the violation of which could lead to the imposition of enforcement sanctions.

d. Inquiry--The inquiry process is a preliminary investigation to evaluate an allegation of wrongdoing and determine if a full-scale investigation is warranted. An inquiry will be initiated when an allegation or other identified set of circumstances indicate wrongdoing or a credible potential for wrongdoing. An inquiry should involve only a limited amount of field work and time (two or three interviews, one or two trips to a facility, a few telephone calls, limited records reviews, 40 hours, etc.). Generally, activity in excess of these guidelines should be considered a full-scale investigation and documented in a Report of Investigation. If OI develops evidence during the inquiry phase indicating that the matter under investigation does involve wrongdoing, OI will [~~immediately~~] expand the inquiry into a full-scale investigation. Inquiries which fail to support the need for a full-scale investigation, or which determine that the allegation is unfounded, will be closed on a Report of Inquiry. If an inquiry yields sufficient evidence to substantiate[~~s~~] an allegation of willful wrongdoing, it will be considered a full-scale investigation and as such will be documented as a Report of Investigation regardless of the amount of field work or time expended.

e. Full-Scale Investigation--A full-scale investigation will be initiated when there is credible information to suspect that an NRC requirement has been breached with some degree of intent or purpose. If OI receives an allegation of suspected wrongdoing which on its surface is squarely within the OI jurisdictional parameters regarding indications of willfulness (i.e., falsification of records, blatantly deliberate material false statements to NRC, etc.), or more typically, receives a written request for investigation indicative of such wrongdoing, then OI may open a full-scale investigation immediately, without a [~~any~~]

preliminary inquiry. If the issue is not clear-cut, as is most often the case, then the inquiry evaluation process will be used to determine the need for a full-scale investigation. Once a full-scale investigation has been initiated, the results will be documented in a Report of Investigation, even if the allegation is unsubstantiated at the conclusion of the investigation. This does not preclude reverting a full-scale investigation back to an inquiry at the discretion of the Field Office Director if it is seen during the very early stages of the investigation that the allegation is unfounded.

f. Wrongdoing--In the context of OI investigations, an act of wrongdoing is one in which an NRC requirement has been breached with some intent or purpose to commit the breach, rather than through mistake or error. Indicators of willfulness include careless disregard for NRC requirements, deception, wrongdoing accomplished in the name of expediency, etc.

definition
should be
conformed to
MC 0517-0415
recently referred
to Commission
for approval

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CHAPTER 2

RESPONSIBILITIES OF THE OFFICE OF INVESTIGATIONS

2.1. Mission Statement

The NRC Office of Investigations (OI) develops policy, procedures, and quality control standards for the conduct of all NRC investigations of licensees, permittees, or applicants, or contractors and vendors of such entities; conducts and supervises investigations within the scope of NRC authority [;] except those of NRC employees and NRC contractors; assures the quality of investigations; maintains current awareness of inquiries and inspections by NRC offices to identify the need for formal investigations; makes appropriate referrals to the Department of Justice; keeps the Commission and involved NRC Offices currently apprised of matters under investigation as they affect public health and safety, the common defense and security, environmental quality, or the antitrust laws; and maintains liaison with other agencies and organizations to ensure the timely exchange of information of mutual interest. OI may commence appropriate investigative activity when a matter is brought to the attention of OI involving suspicion that an NRC regulatory requirement has been breached with some intent or purpose to commit the breach, rather than through mistake or error.

2.2. Authority

The Commission has delegated to the Director of the Office of Investigations the authority to take the necessary steps to accomplish the OI mission, as described in Title 10 of the Code of Federal Regulations, Chapter ~~Part~~ 1, Section 1.36 (1985). See Section 161(c) of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2201(c)); and Sections 201(a)(2) and 206 of the Energy Reorganization Act of 1974 (42 U.S.C. 5841 and 5846). ✓

2.3. Jurisdiction

OI investigations will assist the Commission and its various components by investigating wrongdoing such as careless disregard, deception, and other indications of willful violations by licensees, applicants, or permittees, by contractors, subcontractors, vendors of such entities, and/or by management, supervisory, and other employed personnel of such entities, who may have committed violations of the Atomic Energy Act, the Energy Reorganization Act, and rules, orders, and license conditions issued by the Commission thereunder. Section 161(c) of the Act also authorizes OI to conduct such other investigations that the Commission may direct.

2.4. Code of Conduct for OI Personnel

Each OI employee should understand and abide by NRC rules and regulations for the conduct of employees in accordance with 10 CFR Part 0 and NRC Manual Chapter 4124 and its Appendix. ✓

Policy 8

Investigators and others assigned to OI investigations shall identify, collect, and preserve evidence relevant to investigations which would have potential value in an enforcement or other proceeding. When necessary, OI may request orders or issue subpoenas to preserve or obtain such evidence.

[reflects current delegate of author

Policy 9

Investigators and others assigned to OI investigations shall attempt, when warranted by the importance to the investigation, to witness and/or photographically record the violation or condition that is the focus of the investigation.

Policy 10

Investigators and others assigned to OI investigations will be alert for indications of deliberate violations of NRC regulations or Federal statutes and will pursue relevant leads. They will also make reasonable efforts to determine the extent of involvement or awareness by management of licensees, applicants, vendors or other entities in any instances of deliberate violation of NRC regulations or Federal statutes.

Policy 11

Other NRC components will provide OI with timely legal and technical assistance consistent with its impact on the overall NRC mission.

Policy 12

OI may use the investigative support of Federal, State or local agencies or other organizations during the course of OI investigations.

Policy 13

may require change if MOU w/ DOJ is achieved

OI shall be the primary office responsible for referral, and related discussions of investigative matters with the Department of Justice (including the U.S. Attorneys and the Federal Bureau of Investigation). Emergency situations requiring prompt field referral to the DOJ and/or FBI should be made without delay or consultation with OI. Referrals for prosecution or investigation, inquiries or the transmittal of investigative information to these agencies shall be promptly documented in writing with copies provided to offices concerned.

Policy 14

Investigative activity of OI may occasionally develop information within the jurisdiction of another agency. This information will be routinely provided to that agency under appropriate controls.

Policy 15

evidence. OI will not make a determination as to whether the occurrence constitutes a violation or furnish recommendations for enforcement/corrective action.

Policy 23

OI reports of investigation, while in preparation or review, will not be circulated outside NRC without specific approval of the Chairman.

Policy 24

OI reports of investigation, while in preparation or review, will normally not be circulated to other NRC offices. In those cases where OI perceives the existence of safety questions requiring prompt attention or determines that it would be of substantial benefit to the accuracy of the final report, OI ~~may~~ must [per LZ] have other NRC officials review, and comment on pertinent portions of the report. Final OI investigative reports will be provided to the appropriate NRC officials.

Policy 25

The Office of Inspector and Auditor retains responsibility for investigations regarding NRC employee and contractor misconduct and internal waste, fraud and abuse.

Policy 26

OI shall be informed promptly by NRC employees of all allegations which involve wrongdoing, other than allegations of wrongdoing on the part of NRC employees or NRC contractors, which are the responsibility of OIA.

include in Policy 2?? Compromise 11/19/86 Chuck + Hayes SZ-1

3.2. Initiation of Investigations

The Commission has delegated the Director, OI, the authority to initiate investigations at the request of the Commission, the EDO, a Regional Administrator, or on his own initiative. The Director, OI, has delegated authority to the Deputy Director, OI, and the Directors of OI Field Offices to initiate OI investigations within the procedural guidelines set forth in this section. On January 10, 1986, the Secretary of the Commission issued a Staff Requirements Memorandum (SRM) that set forth the Commission's guidance regarding the initiation, establishment of priorities, and termination of investigations. This guidance, which essentially was based on SECY-85-369, has been previously provided all OI components, and is incorporated in the guidance set forth in this Manual. The SRM in its entirety is Appendix L to this Manual.

3.2.1. Requests for Investigation. All requests for investigation from outside OI must be in writing. Such requests must be in accordance with the guidance set forth in Appendix L. Requests originating from an NRC Region should be addressed to the appropriate OI Field Office Director and must be signed by the Regional Administrator. Requests from the NRC headquarters staff should be addressed to the Director, OI, and must be signed by the EDO.

Investigations may be initiated immediately on oral request of competent authority under exigent circumstances. Such oral requests must be subsequently documented as described below. OI Field Office Directors are expected to decide the course of action on each investigative request on a case-by-case basis on its own merit, not on the availability of resources.

3.2.1.1 Form and Content of Written Requests for Investigation.

The form and content of requests for investigation will be in accordance with the guidance set forth in Appendix L to this Manual. Such requests normally will contain the requestor's views regarding whether wrongdoing is reasonably believed to be involved, the significance of such wrongdoing, the regulatory requirements believed to have been violated, the priority of the investigation (high, normal, or low), and the impact of the failure by OI to finish the investigation by the date that the requestor indicates is necessary. Field Office Directors and other OI personnel involved in approval of the initiation of investigations are required to review written requests for investigation carefully to ensure that the requestor has provided all the information required to make an investigative determination. Requests that lack this information should be returned to the requestor for additional staffing.

3.2.1.2 Investigative Thresholds. Once a determination has been made that the written request for investigation meets NRC requirements, then OI is responsible for an independent evaluation of whether the wrongdoing forming the basis of the request meets the threshold for investigations set forth in Appendix L. OI will normally initiate an investigation if:

1) The staff has found that the alleged wrongdoing has had or could have an impact on the public health and safety, the common defense and security, protection of the environment, or antitrust laws provided that these matters are within NRC jurisdiction; and

2) The Director, OI determines that there is a reasonable basis to believe that the matter involves wrongdoing; and

3) The Director, OI determines that there is sufficient information available to support the allegation to warrant initiation of an investigation.

In accordance with current Commission guidance, OI is required to seek Commission guidance prior to initiation of an investigation relating to the character or integrity of an individual within NRC jurisdiction.

[conform to new Policy 2.7.]

but this does not involve violation NRC regulation requirement

3.2.1.2. Notification of Requestor. OI must notify the requestor within 30 days as to whether the matter has been accepted for investigation, and if so, the priority of the investigation and the estimated schedule. This notification must be in writing and normally will be done by the appropriate Field Office Director. Similarly, OI must advise the requestor of any substantial change in the estimated date of completion for the investigation. Note that Appendix L provides for a reclama process by the requestor in the event there is disagreement with

Appx L

an OI decision not to investigate, or the priority or schedule assigned to the matter by OI.

3.2.2. Initiation of Investigations Without Requests. Occasionally OI will learn directly of allegations, events, or developed information that in its view warrant investigation. Normally, such matters would be brought to the attention of the appropriate Regional Administrator or the EDO for a formal investigative request. However, there may be circumstances under which OI may elect to initiate an investigation without waiting for a formal request. One such circumstance could be where it is obvious that the matter is within OI jurisdiction and there is the need for exigent action. Yet another would be where there is disagreement between the Staff and OI as to whether a particular matter warrants investigation. Under these circumstances, Field Office Directors in consultation with OI:HQ (whenever practicable), may open an investigation without first seeking an investigative request. The appropriate Regional Administrator or the EDO will be informed of such initiations. Such allegations should be incorporated in the region Allegation Tracking System by OI in order to maintain a central focal point within NRC for tracking all allegations. In order to ensure that elements normally required to be found in a written request emanating from outside OI are documented, such self initiated investigations will documented on the same form currently used by the Staff to request investigations and forwarded to the Director, OI. This documentation will be provided to the Commission by OI:HQ in the same fashion as Staff written requests are provided

Similar guidance pertains to situations where OI is conducting an inquiry which develops information indicating the need for a full-scale investigation. OI will assign a control number to the case by the submission of an Investigation Status Record (NRC Form 305). The case number will be derived by deleting the "G prefix from the inquiry number. As noted below, such changes will be reported to the Commission by OI:HQ in the same manner as the initiation of investigations.

3.2.3. Reporting Requirements. Investigative Policy 4 requires that OI inform the Chairman of the initiation of all OI investigations. All investigations and inquiries must be documented on an NRC Form 305, Investigation Status Record, which is then transmitted to OI:HQ normally within 1 working day of case initiation. Full-scale investigations are subsequently reported to the Commission by OI:HQ. Inquiries are documented on an NRC Form 305, but are not normally reported to the Commission unless they are upgraded to a full-scale investigation (see paragraph 1.5. d and e, this manual). As indicated above, OI will inform the Commission, the appropriate Regional Administrator, the EDO, and/or when warranted, appropriate staff offices when OI initiates an investigation on its own authority.

3.2.4. Board Notification of Allegations. The Commission has approved an agency-wide policy regarding notification of licensing boards, appeal boards, or the Commission of new and potentially important information which the technical staff believes to be relevant to one or more proceedings pending before the boards or the Commission.

the possibility that the violation resulted from accident, worker carelessness, ignorance, or confusion;

f. Attempts at deception by a licensee or contractor, such as

- watering down facts given to NRC,
- failure to record/document reports of non-compliance,
- efforts to contain, divert, or stop information from reaching NRC,
- efforts to segregate, isolate, transfer, fire, intimidate, or otherwise retaliate or discriminate against allegers surfacing or attempting to surface information of interest to the NRC, or for providing safety-related information to employers, and
- manipulation of documentation to confuse or hinder investigation/inspection efforts by NRC;

g. Documentation or testimony directly demonstrating that licensee management knew an act was wrong and against NRC requirements, but proceeded regardless;

h. Any evidence of acts committed in the name of "expediency," with later claims that the commission was a result of confusion on the part of the licensee; and

i. Falsification of documents.

3.3.6. Standards of Investigative Thoroughness. OI conducts investigations to determine if there was a deliberate breach of an NRC regulatory requirement. The results of such investigations are normally used as the basis for NRC regulatory actions such as licensing decisions or enforcement actions. Consequently, the investigator must pursue and develop all relevant investigative leads in enough detail and depth to provide NRC decision-makers sufficient information to make an informed decision. It is particularly important for investigators to gather as much information as possible regarding the willfulness of violations uncovered during investigations as this issue is of great importance to the regulatory process.

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When an OI investigation begins to demonstrate the willful violation of an NRC requirement, it will often become apparent that a criminal statute has been violated in addition to the alleged breach of NRC regulatory requirements. Investigators will complete the investigation in order to satisfy the regulatory needs of the NRC. On completion, OI will refer the matter to the appropriate government agency in accordance with Chapter 8 of this manual. Investigators will not continue an investigation solely for the purposes of further perfecting a criminal violation ~~(except at the direction of OI:HQ)~~

per LZ

3.3.7. Case Management. The above discussion describes the initial phases of an investigation or inquiry. The investigative plan should be under continual change, revision, and modification during the entire course of an investigation, as a result of case review by the investigator or supervisor or as new information is developed. The investigator has the responsibility to keep the plan current and follow through with the development of identified leads. The Field Office Director has the responsibility to conduct a review of the progress of ongoing cases and discuss the direction of investigative efforts with the investigator at least monthly. This review will be documented in the case file.

3.4.1. Termination of Investigations. Appendix L also contains guidance regarding the criteria for termination of investigations. All OI personnel are to comply fully with this guidance. It is also useful to discuss briefly the standard of proof generally used by the NRC in its regulatory actions and its relationship to the investigation. The normal level of proof is a "preponderance of evidence" as opposed to the criminal standard of proof "beyond a reasonable doubt". In lay terms, it requires more evidence to prosecute using the criminal standard than it does to prosecute using the civil standard of preponderance of evidence. In practical terms, however, it has little bearing on a decision as to when to terminate an investigation.

In practice, it is difficult enough for the courts, let alone an investigator to discern sharply between the quanta of evidence needed for either standard. ~~At the same time, there has been a tendency on the part of NRC users of OI reports of investigation to request a greater amount and quality of evidence in matters involving willful violations, especially by individuals.~~ Consequently, investigators should not concern themselves during investigations with the distinctions between levels of proof. Rather, investigations should be conducted in accordance with existing standards of thoroughness and objectivity with a view to collecting all evidence readily susceptible to the investigative process that tends to prove or disprove the wrongdoing that is being investigated. When an investigator is confident that he or she has gathered all the evidence that is attainable and necessary for the objective adjudication of the matter, the investigation should be terminated. OI managers will be responsible for monitoring this process to ensure that OI investigations continue to provide sufficient information to support NRC's regulatory needs.

gratuitous and itself unsuscep to proof.

investigator's request will be refused) OI may issue subpoenas before cooperation has been refused.

There are several general limitations on the use of subpoenas. Subpoenas must be issued in good faith and the information sought by the subpoena must be relevant to the OI investigation. Moreover, the subpoena must be reasonable. This means that the time and place of interview must be reasonable, any demand for documents or other tangible evidence must be reasonable, and the subpoena must describe the information sought with reasonable particularity.

4.4.4. Subpoena Approval Guidelines. The Director, OI (or Acting Director), shall issue all OI subpoenas. Whenever practicable, the Field Office Director shall request the subpoena by memorandum to the Director, OI and attach a draft subpoena to the memorandum. The memorandum requesting the subpoena should address:

a. details of the situation and need for the subpoena, i.e., the refusal of the person or party to cooperate,

b. the information or documentation desired,

c. a coordination with the NRC staff to determine that the desired information/documentation is not already available within NRC,

d. what other means are available to obtain this information,

e. the need for personal service if service by mail is not desired,

f. the address of the individual or entity to be served with the subpoena, and

g. a return date with sufficient and reasonable lead time (at least 2 weeks from the anticipated date of issue of the subpoena).

Upon receipt of a request for a subpoena, OI Headquarters will obtain ~~notify~~ ~~[illegible] the Commission.~~ OI Headquarters will prepare the approved subpoena for the signature of the Director or Acting Director, OI. The requesting Field Office Director should allow sufficient time for the approval process.

review by OGC of the request and will provide suitable notice to the Comm in advance of issuing subpoena

When a written request is not practical because of time constraints or other case-unique problems, the investigator may request a subpoena by telephone, from OI Headquarters. This will shorten the approval time considerably. The investigator must then provide OI Headquarters with the same information as required in written subpoena requests. The originating OI office will follow-up its oral request in writing, citing the telephonic contact and notifying OI Headquarters of results achieved from the subpoena.

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4.4.5. Service of Subpoenas. After subpoenas are authorized, they must be delivered to ("served upon") the person or legal entity named in the subpoena. Subpoenas must be served in a particular manner to acceptable. A person compelled to submit documentary evidence is entitled by law (5 USC 555(c)) to retain a copy of such evidence.

the interva

If the subpoena requires the named person to appear and testify, the investigator will conduct an interview of the person in the normal manner. In such instances ~~serious consideration~~ should be ~~given to~~ the use of a court reporter, or, at a minimum, be a taped interview. OI does not require an NRC attorney to attend these interviews, although OI may request such assistance in appropriate circumstances. OI investigators should normally be accompanied at such interviews by at least one other Government employee. A person compelled to provide testimony is entitled by law (5 USC 555(c)) to obtain a copy of the results of such testimony. However, for good cause, the person may be limited to inspection of the testimony during the pendency of the investigation.

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A person compelled by subpoena to testify to OI is entitled by law (5 USC 555(b)) to be accompanied, represented, and advised by counsel or other personal representative (see paragraph 4.5, this manual). This right is subject to the limitation that under certain circumstances it may be possible that counsel representing another party at interest could be excluded (see paragraph 4.5., this manual). In that event, the interviewee is entitled to secure other counsel. Interviewees must still answer the investigator's questions directly--not through counsel. Counsel may not ~~cross~~examine the interviewee. An investigator may discuss matters with counsel, if it is expedient. Examples of reasons for such discussions would be the need to clarify procedural matters or the need to determine the basis for any refusal to answer specific questions.

[incorrect term] X

An interviewee may not refuse to answer a question because the answer would be personally embarrassing, adversely affect a friend, cause him/her to lose a job or license, or reveal trade secrets or confidential information. An interviewee may invoke any of the testimonial privileges recognized by Federal law, e.g., self-incrimination. When the privilege asserted is the privilege against self-incrimination, a special procedure is available to compel the otherwise privileged testimony upon the grant of "use immunity."

The investigator must report to OI Headquarters any refusal to produce evidence or answer questions in compelled interviews. The investigator may at his/her discretion, either suspend the interview upon encountering such a refusal or continue with other areas of questioning and contact OI Headquarters thereafter.

4.5. Exclusion of Third Parties from Interviews

Interviews are to be conducted during investigations under conditions that enhance the investigator's ability to ensure that NRC obtains full, complete, and accurate information. Individuals being interviewed will normally be permitted to have a personal attorney or other personal representative present during interviews. However, if the personal attorney or representative also represents another potential interviewee or the company being investigated, the investigator will contact OI headquarters and a case-by-case determination shall be made whether to

This section cannot be fully resolved until Policy 6 is resolved continue with the interview or seek exclusion of

~~exclude~~ the personal attorney or representative on conflict of interest grounds. Normally, OI will not permit other third parties, such as licensee management or union stewards, to be present during interviews. OI Headquarters will resolve requests for the presence of persons other than personal counsel on a case-by-case basis after consultation with OGC.

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4.6. Tape Recording Investigative Interviews

The use of stenographic reporters or tape recorders during interviews will be at the discretion of the investigator. They will not normally be used due to the impediment they may pose to the free flow of information. Requests by an interviewee to have an interview recorded will be dealt with on a case-by-case basis. The investigator may either allow taping or terminate the interview. The NRC normally will make the tape if an interview is recorded, and will not provide the interviewee a copy of the tape before the investigation has been completed.

If NRC has compelled testimony by subpoena, then testimony should be transcribed as suggested in § 4.4.6 on p. 4-6!

The interviewee would, however, be entitled to review the tape if compelled to testify per 5 U.S.C. 555(c). *See* § 4.4.6 at p. 4-6

In some instances, the use of a court reporter to transcribe an interview might be more appropriate than either a written statement or a Report of Interview. Examples of such circumstances include compulsory testimony in compliance with a subpoena, situations where the issues are highly technical, interview of a female witness by one male investigator (or of a male witness by a female investigator), where there is a need for accuracy in a lengthy or complicated interview, in some confrontational situations, or where it is necessary to interview a senior level management official. The decision to use a court reporter is left to the discretion of the investigator and the OI Field Office Director.

See comment re transcript at pp 4-6

However, when court reporters are used, the investigator must ensure that a clear understanding exists regarding ownership, security, and distribution of the transcripts. Copies of transcripts are not to be distributed by the reporting service to other than the investigator who contracted for the service. The interviewee is entitled to a copy of his/her testimony if compelled to testify, but, for good cause, the investigator may limit the interviewee to a viewing of the transcript until after the investigation is completed. See 4.4.6 and 4.6.

At the beginning of such an interview, the same data identifying the interviewee should be placed on the record as on a written statement. See 4.1(c).

5.8. Investigative Notes

Whether or not to take notes during an interview (or other investigative activity) is a decision left to the discretion of the investigator. However, contemporaneous notes made by an investigator during an investigation will certainly promote an accurate, effective, and thorough investigative product.

The term "notes" includes handwritten notes, dictated notes, and other work papers made during an investigation. This term also includes documents prepared outside of but derived directly from an investigative activity. Notes should contain the dates and locations of record reviews, contents of interviews, or other activities. They should fully identify persons interviewed, other individuals present, and persons who provide assistance or documentation to investigators. Finally, the notes should record the existence of unusual conditions or other developments which may impact upon the investigation.

5.8.1. Method and Amount of Note Taking. The method of taking notes is left to the discretion of the investigator. The amount of note taking will vary with the circumstances. Friendly witnesses will seldom object to notes being taken during an interview. On the other hand, hostile, or indifferent witnesses may be reluctant to provide any information, or worse, may hold back important information if they observe the investigator taking down notes of their verbal remarks. The investigator's experience, an assessment of the witness, and the on-the-spot reactions of the interviewee will dictate the extent of note taking.

outside the NRC does not exempt it from the reach of subpoenas or orders granting judicial or administrative discovery motions.

5.9.3. Disagreements Regarding the Content in Draft Documents. OI employees may disagree with revisions made during management review of reports or other official documentation. Such disagreements should be voiced at the time through the appropriate chain of command. The draft in question may be retained until a final decision is reached regarding the employee's objections. If an agreement is reached, the draft will be destroyed. If the employee still disagrees with the final OI management decision, the employee should prepare a memorandum to the files of OI documenting the reasons for disagreement. The draft(s) in question should be appended to the memorandum and placed in the appropriate official OI file. (This procedure is not intended to preclude an OI employee's right to make use of the NRC Differing Professional Opinion procedures if the employee so chooses.) The Director, OI will ensure that differing views are provided to the Commission or staff as appropriate in connection with their review of the final OI report

5.10. Case File Management

All material placed in the case file will be affixed to the folder in chronological order. When the information concerning a case becomes too voluminous for one folder, an additional folder is set up. Such folders are then designated 1 of 3, 2 of 3, 3 of 3, as necessary. All OI investigation case file folders are organized as outlined below:

Position in Folder	Attachment
Inside front cover	Case opening documents Monthly status reports Other updating reports Case chronology record Investigative plan
Front facing divider	Memoranda to file Notification of Case Opening Telephone conversation records Case-related correspondence Transmittal Correspondence
Back-facing divider	Congressional Correspondence Media Articles Enforcement actions Other pertinent correspondence
Inside back cover	Department of Justice or other referral correspondence

sp. X Accordi~~a~~on folders will be placed directly behind the blue folder in the following sequence:

(1) Accordi~~a~~on Folder	Report of Investigation with Attachments

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

September 30, 1986

MEMORANDUM FOR: Chairman Zech
Commissioner Roberts
Commissioner Asselstine
Commissioner Bernthal
Commissioner Carr

FROM: Ben B. Hayes, Director
Office of Investigations

SUBJECT: SECY-85-255 - OI INVESTIGATIVE PROCEDURES MANUAL

The January 13, 1986 Staff Requirements Memorandum (SRM) on this subject directed the Office of Investigations (OI) to consider the written comments regarding the OI Investigative Procedures Manual that were provided by Commissioners Roberts, Bernthal, and Zech as well as by OIA and OGC. During the rather lengthy period that has since intervened, there have been a number of policy and procedural decisions made by the Commission that required an updating of the OI Manual. There were also changes to be made as a result of our experience gained during our trial use of the Manual. Consequently we made appropriate revisions to the OI Manual to reflect those changes prior to considering the comments forwarded by the SRM. With the exception of comments regarding existing OI policies and certain editorial comments, both of which will be discussed below, it is our view that those revisions to the OI Manual substantially address the comments that we received from the Commissioners and OIA.

There were two types of changes that we did not attempt to make. The first were any regarding existing OI Policies. As the existing policies represent the Commission's policy guidelines for OI operations, we do not believe that this would be the proper mechanism to attempt to modify them. It is our view that any such changes would be addressed more properly in an option paper or papers submitted to the Commission for formal vote.

Where editorial comments identified imprecise or awkward wording, the changes were made. Where the comments were more vague, (such as the commenter expressing concern regarding the clarity of a section), or represented the commenter's preference in wording, we generally did not make the changes unless we either believed the section in question in fact to be unclear, or we agreed that the suggested wording was a significant improvement.

On balance, we believe the large number of changes or revisions have not only improved the value of the OI Manual to this Office, but are generally responsive to most, if not all, of the comments received. Rather than attempt to list each comment separately in some sort of matrix, we have elected to incorporate all of our changes in a revised Manual. With exception of Chapter 7 which deals with confidentiality, we have appended the final draft of the revised Manual (sans appendices) as enclosure 1. All significant changes have been underscored, and in most cases, the previous wording has been bracketed for ease of reference. We will forward a copy of Chapter 7, which is currently being coordinated with the Staff and OIA, within 30 days.

We believe that the approach that we have used will achieve the same desired effect as stated in the SRM in that it will provide a ready means to judge the overall content of the OI Manual. In the event that the Commission desires more, we stand ready to furnish any additional analyses that may be required.

Enclosure:
As stated

cc: SECY
OGC

DRAFT
September 30, 1986

CHAPTER 1

GENERAL

1.1. Purpose of the Manual

This manual prescribes policies, procedures, and guidelines for the conduct of investigative activities of the Nuclear Regulatory Commission (NRC) Office of Investigations (OI).

1.2. Applicability of the Manual

This manual applies to OI Headquarters, all subordinate offices, and all other OI elements (special teams or task forces) when conducting investigative activities within the responsibility of OI.

1.3. Director's Guidance File

1.3.1. Content and Format. This separate file provides an ordered means for issuing guidance to investigators on a current basis without the formalities attendant to the issue of an OI manual chapter, section or paragraph. Such guidance may be only of interim importance. However, the guidance may also be material that once proven by trial use will be added to the Manual. In the alternative, the material may be continued from year to year as guidance or discontinued altogether. (This process is described in Section 1.3.4, infra.) The format is illustrated in Appendix A.

1.3.2. Preparation of Director's Guidance Issuances. Suggestions may be made to the Director for material to be issued as guidance. These suggestions may be in the form of problems that need authoritative resolution or drafts of material for consideration. The Office of the Director will prepare and release all final guidance issuances with the approval of the Director.

1.3.3. Numbering of Issuances. A series is initiated each calendar year for numbering guidance issuances. Those issued in 1985 are numbered sequentially, starting with 85-001. In 1986, they will start with 86-001. The Office of the Director will assign numbers.

1.3.4. Annual Review of Guidance Issuances. In December of each year, the Director appoints a three-person committee to review all guidance issuances of that year. The Committee will recommend to the Director the disposition of each issuance, which will be:

a. modified as necessary to become a Manual addition or change,

b. deleted because it is no longer needed, or

c. carried forward to the next year with a new number in the next series. For example, 85-008 might become 86-001.

1.3.5. Additions to or Changes in Guidance Issuances. In the event it is necessary to change guidance material, the changed (or corrected) page is reissued with an appropriate indication. The indication of a change is an asterisk and a footnote that gives the change number (sequential by year) and date. For a change of only one sentence, the asterisk follows the sentence; for a paragraph (or paragraphs or pages) an asterisk precedes the beginning of the change and an asterisk is placed at the end of the change.

1.3.6. Distribution. A changed page (or pages) and new material is transmitted to all manual holders with a transmittal sheet that is to be retained in the file. The transmittal sheet is illustrated in Appendix B.

1.3.7. Filing and Maintenance. The Director's Guidance File is to be kept with the Manual and is to be maintained up to date by all holders of the Manual. .

1.4. OI Manual Additions and Changes

1.4.1. Types of Changes. The Manual can be changed by adding new material, revising old material, or making minor corrections to old material by "pen and ink" changes.

1.4.2. Sources of Changes. The Director will appoint a committee to conduct an annual review and suggest revisions. In addition, any manual user may suggest revisions to the Director.

1.4.3. Annual Review of Manual. In December of each year, the Director appoints a three-person committee to review the Manual completely and to generate the needed additions and changes. This committee is the same as that appointed to review the Director's Guidance File (see 1.3.4.).

1.4.4. Preparation and Distribution of Changes. The annual review committee will prepare recommended changes and submit those recommendations to the Director for approval. The Office of the Director will distribute approved changes to manual holders. Changes suggested for consideration at times when the annual review committee is not in session will be considered by the Director and if approved, distributed to manual holders by the Office of the Director.

1.4.5. Procedures for Maintaining the Manual. A change in the Manual is accomplished by issuance of a new page (or pages) or instructions for making a "pen and ink" change on an existing page. The indication of a change is an asterisk and a footnote that gives the change number, which is sequential for any change or addition, and the date of the change. For a change of only one sentence, the asterisk follows the sentence; for a paragraph (or paragraphs or pages) an asterisk precedes the beginning of the change and an asterisk is placed at the end of the change. Each holder of the Manual is responsible for assuring that the copy held by him or her is up-to-date and accurate.

1.4.6. Transmittal Sheet for Manual Changes. A changed page (or pages) and added material are transmitted to all manual holders with a transmittal sheet that is to be retained in a manual file. The transmittal sheet is illustrated in Appendix C.

1.4.7. Filing and Maintenance. Manual changes specified in the transmittal sheets are to be made immediately and the transmittal sheets are to be kept for future reference for checking completeness of the Manual. Replaced Manual pages are to be discarded.

1.5. Explanation of Terms

a. Policy--This term as used in the manual refers to the 26 basic investigative policies which have been approved by the Commission (see paragraph 3.1.).

b. Procedures--The guidelines and instructions for implementation of the basic OI policies approved by the Commission.

c. NRC Requirement--This term as used in this manual will refer to NRC regulations, appropriate statutory provisions, license conditions, technical specifications, orders, or any other regulatory requirement the violation of which could lead to the imposition of enforcement sanctions.

d. Inquiry--The inquiry process is a preliminary investigation to evaluate an allegation of wrongdoing and determine if a full-scale investigation is warranted. An inquiry will be initiated when an allegation or other identified set of circumstances indicate wrongdoing or a credible potential for wrongdoing. An inquiry should involve only a limited amount of field work and time (two or three interviews, one or two trips to a facility, a few telephone calls, limited records reviews, 40 hours, etc.). Generally, activity in excess of these guidelines should be considered a full-scale investigation and documented in a Report of Investigation. If OI develops evidence during the inquiry phase indicating that the matter under investigation does involve wrongdoing, OI will [~~immediately~~] expand the inquiry into a full-scale investigation. Inquiries which fail to support the need for a full-scale investigation, or which determine that the allegation is unfounded, will be closed on a Report of Inquiry. If an inquiry yields sufficient evidence to substantiate[~~s~~] an allegation of willful wrongdoing, it will be considered a full-scale investigation and as such will be documented as a Report of Investigation regardless of the amount of field work or time expended.

e. Full-Scale Investigation--A full-scale investigation will be initiated when there is credible information to suspect that an NRC requirement has been breached with some degree of intent or purpose. If OI receives an allegation of suspected wrongdoing which on its surface is squarely within the OI jurisdictional parameters regarding indications of willfulness (i.e., falsification of records, blatantly deliberate material false statements to NRC, etc.), or more typically, receives a written request for investigation indicative of such wrongdoing, then OI may open a full-scale investigation immediately, without a [~~any~~]

preliminary inquiry. If the issue is not clear-cut, as is most often the case, then the inquiry evaluation process will be used to determine the need for a full-scale investigation. Once a full-scale investigation has been initiated, the results will be documented in a Report of Investigation, even if the allegation is unsubstantiated at the conclusion of the investigation. This does not preclude reverting a full-scale investigation back to an inquiry at the discretion of the Field Office Director if it is seen during the very early stages of the investigation that the allegation is unfounded.

f. Wrongdoing--In the context of OI investigations, an act of wrongdoing is one in which an NRC requirement has been breached with some intent or purpose to commit the breach, rather than through mistake or error. Indicators of willfulness include careless disregard for NRC requirements, deception, wrongdoing accomplished in the name of expediency, etc.

CHAPTER 2

RESPONSIBILITIES OF THE OFFICE OF INVESTIGATIONS

2.1. Mission Statement

The NRC Office of Investigations (OI) develops policy, procedures, and quality control standards for the conduct of all NRC investigations of licensees, permittees, or applicants, or contractors and vendors of such entities; conducts and supervises investigations within the scope of NRC authority [;] except those of NRC employees and NRC contractors; assures the quality of investigations; maintains current awareness of inquiries and inspections by NRC offices to identify the need for formal investigations; makes appropriate referrals to the Department of Justice; keeps the Commission and involved NRC Offices currently apprised of matters under investigation as they affect public health and safety, the common defense and security, environmental quality, or the antitrust laws; and maintains liaison with other agencies and organizations to ensure the timely exchange of information of mutual interest. OI may commence appropriate investigative activity when a matter is brought to the attention of OI involving suspicion that an NRC regulatory requirement has been breached with some intent or purpose to commit the breach, rather than through mistake or error.

2.2. Authority

The Commission has delegated to the Director of the Office of Investigations the authority to take the necessary steps to accomplish the OI mission, as described in Title 10 of the Code of Federal Regulations, Part 1, Section 1.36 (1985). See Section 161(c) of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2201(c)); and Sections 201(a)(2) and 206 of the Energy Reorganization Act of 1974 (42 U.S.C. 5841 and 5846).

2.3. Jurisdiction

OI investigations will assist the Commission and its various components by investigating wrongdoing such as careless disregard, deception, and other indications of willful violations by licensees, applicants, or permittees, by contractors, subcontractors, vendors of such entities, and/or by management, supervisory, and other employed personnel of such entities, who may have committed violations of the Atomic Energy Act, the Energy Reorganization Act, and rules, orders, and license conditions issued by the Commission thereunder. Section 161(c) of the Act also authorizes OI to conduct such other investigations that the Commission may direct.

2.4. Code of Conduct for OI Personnel

Each OI employee should understand and abide by NRC rules and regulations for the conduct of employees in accordance with 10 CFR, Part 0 and NRC Manual Chapter 4124 and its Appendix.

2.4.1. Objectivity. The OI investigator must be free from impairments to objectivity in all matters relating to investigative work. The investigator has the responsibility for maintaining independence and objectivity so that judgements used in obtaining evidence and conducting interviews will be impartial. To preserve this independence, investigators shall not have nor give the appearance of having:

a. preconceived ideas toward individuals, groups, organizations, or objectives of a particular program that could bias the investigation,

b. biases that result from membership in, employment in, or loyalty to, a particular group or organization that is being investigated,

c. financial interest, direct or indirect, in the individual, entity, or program being investigated, and

d. official, professional, personal, or financial relationships that might cause the investigator to limit the extent of the inquiry, to limit disclosure of information, or to weaken the investigative report in any way, or conversely, to cause the investigator to extend the duration or scope of the investigation beyond that warranted by the objective facts associated with that endeavor. In other words, investigators must strive to ensure that their activities are motivated solely by the merits of any investigation that they undertake.

2.4.2. Professionalism. OI investigators are expected to exercise professional care in conducting investigations and in preparing related reports. Therefore,

a. All investigations must be conducted in a thorough manner in accordance with applicable laws, rules and regulations, and with due respect for the rights of those involved,

b. Specific methods and techniques used in each investigation must be appropriate for the circumstances and objectives,

c. All investigations must be conducted in a fair and impartial manner, with the tenacity necessary to determine the facts,

d. Evidence must be gathered and reported in an unbiased and objective manner.

e. All investigations must be conducted and reported in as timely a manner as possible.

f. The investigator must be familiar with and proficient in the techniques and technology of the field of law enforcement and investigations as well as the applicable laws, rules, and regulations.

2.4.3. Complaints of Possible Irregularities or Alleged Misconduct of OI Employees. The investigation of complaints regarding NRC employees falls within the responsibilities of the Office of Inspector and Auditor (OIA) (10 CFR 1.30; NRC Manual Chapter 0113 and its Appendix).

OI will refer complaints or allegations of violations of 10 CFR Part 0 to the Director, OIA, for appropriate action. Complaints or allegations regarding investigative technique or coverage, however, will normally be evaluated and handled by OI management.

CHAPTER 3

INVESTIGATIONS

3.1. Investigative Policies (Policies 1 through 26)

The following policies for the Office of Investigations (OI) have been approved by the Commission as of the effective date of this Manual:

Policy 1

OI will perform thorough, timely and objective investigations. This will include investigations of allegations of wrongdoing by individuals or organizations, other than NRC employees or NRC contractors, which are within the scope of NRC authority.

Policy 2

OI investigations will be conducted in accordance with general procedures and practices of other investigatory agencies.

Policy 3

OI investigators may be delegated authority to administer oaths or affirmations during the course of OI investigative efforts.

Policy 4

OI investigations may be initiated at the request of the Commission, the EDO, or a Regional Administrator, or on the initiative of the Director, OI. The Director, OI, will promptly inform the Chairman of all investigations commenced by OI.

Policy 5

The criteria established for initiating an inspection or an investigation do not preclude concurrent conduct of both types of activity.

Policy 6

Revision currently pending before Commission.

Policy 7

OI investigators may grant requests for confidentiality during the course of an investigation. NRC will respect an OI investigator's promise of confidentiality unless and until the interviewee's testimony is required for an administrative or judicial proceeding or the interviewee discloses the testimony. The identity of persons not subject to the reporting requirements of 10 CFR Part 21 who report to the Commission information addressed by that regulation will also be accorded confidentiality as required by 10 CFR § 21.2.

Policy 8

Investigators and others assigned to OI investigations shall identify, collect, and preserve evidence relevant to investigations which would have potential value in an enforcement or other proceeding. When necessary, OI may request orders or subpoenas to preserve or obtain such evidence.

Policy 9

Investigators and others assigned to OI investigations shall attempt, when warranted by the importance to the investigation, to witness and/or photographically record the violation or condition that is the focus of the investigation.

Policy 10

Investigators and others assigned to OI investigations will be alert for indications of deliberate violations of NRC regulations or Federal statutes and will pursue relevant leads. They will also make reasonable efforts to determine the extent of involvement or awareness by management of licensees, applicants, vendors or other entities in any instances of deliberate violation of NRC regulations or Federal statutes.

Policy 11

Other NRC components will provide OI with timely legal and technical assistance consistent with its impact on the overall NRC mission.

Policy 12

OI may use the investigative support of Federal, State or local agencies or other organizations during the course of OI investigations.

Policy 13

OI shall be the primary office responsible for referral, and related discussions of investigative matters with the Department of Justice (including the U.S. Attorneys and the Federal Bureau of Investigation). Emergency situations requiring prompt field referral to the DOJ and/or FBI should be made without delay or consultation with OI. Referrals for prosecution or investigation, inquiries or the transmittal of investigative information to these agencies shall be promptly documented in writing with copies provided to offices concerned.

Policy 14

Investigative activity of OI may occasionally develop information within the jurisdiction of another agency. This information will be routinely provided to that agency under appropriate controls.

Policy 15

OI shall keep NRC components which request OI investigations informed of significant developments in ongoing investigations.

Policy 16

The requester of an OI investigation and any NRC component aware of such ongoing investigation shall advise OI of any additional information it receives/develops during the pendency of the investigation.

Policy 17

OI shall advise cognizant NRC components of safety issues discovered as the result of an ongoing OI investigation.

Policy 18

With the exception of significant safety issues, information regarding an ongoing OI investigation will not be disclosed by any NRC employee outside NRC without the specific approval of the Director, OI or his designee.

Policy 19

Investigators and others assigned to an OI investigation or inquiry will normally not discuss the substance of ongoing OI inquiries and investigations with licensees or other non-NRC personnel in entrance or exit interviews, except safety items requiring immediate corrective action.

Policy 20

Investigators will thoroughly and accurately document their investigative efforts and substantive information developed during investigation.

Policy 21

OI investigative reports shall be in sufficient detail to permit an informed managerial review of the issues under investigation, and to permit an NRC determination as to the need for enforcement or other corrective actions.

Policy 22

Reports of Investigation (ROI) prepared by OI investigators should contain an objective recitation of all relevant facts developed in the course of the investigation. This factual recitation may also contain the conclusions of persons interviewed. Conclusions of the investigators on issues of intent, willfulness, or other matters of wrongdoing investigated will be included in investigation reports or other documents and should be designated as such. In a memorandum transmitting the Report of Investigation to the NRC action office, OI management will normally include overall conclusions regarding what OI believes occurred in the matter investigated or its opinion as to the weight of the evidence. OI will not make a determination as to whether the occurrence constitutes a violation or furnish recommendations for enforcement/corrective action.

Policy 23

OI reports of investigation, while in preparation or review, will not be circulated outside NRC without specific approval of the Chairman.

Policy 24

OI reports of investigation, while in preparation or review, will normally not be circulated to other NRC offices. In those cases where OI perceives the existence of safety questions requiring prompt attention or determines that it would be of substantial benefit to the accuracy of the final report, OI may have other NRC officials review, and comment on pertinent portions of the report. Final OI investigative reports will be provided to the appropriate NRC officials.

Policy 25

The Office of Inspector and Auditor retains responsibility for investigations regarding NRC employee and contractor misconduct and internal waste, fraud and abuse.

Policy 26

OI shall be informed promptly by NRC employees of all allegations which involve wrongdoing, other than allegations of wrongdoing on the part of NRC employees or NRC contractors, which are the responsibility of OIA.

3.2. Initiation of Investigations

The Commission has delegated the Director, OI, the authority to initiate investigations at the request of the Commission, the EDO, a Regional Administrator, or on his own initiative. The Director, OI, has delegated authority to the Deputy Director, OI, and the Directors of OI Field Offices to initiate OI investigations within the procedural guidelines set forth in this section. On January 10, 1986, the Secretary of the Commission issued a Staff Requirements Memorandum (SRM) that set forth the Commission's guidance regarding the initiation, establishment of priorities, and termination of investigations. This guidance, which essentially was based on SECY-85-369, has been previously provided all OI components, and is incorporated in the guidance set forth in this Manual. The SRM in its entirety is Appendix L to this Manual.

3.2.1. Requests for Investigation. All requests for investigation from outside OI must be in writing. Such requests must be in accordance with the guidance set forth in Appendix L. Requests originating from an NRC Region should be addressed to the appropriate OI Field Office Director and must be signed by the Regional Administrator. Requests from the NRC headquarters staff should be addressed to the Director, OI, and must be signed by the EDO.

Investigations may be initiated immediately on oral request of competent authority under exigent circumstances. Such oral requests must be subsequently documented as described below. OI Field Office Directors are expected to decide the course of action on each investigative request on a case-by-case basis on its own merit, not on the availability of resources.

3.2.1.1 Form and Content of Written Requests for Investigation.

The form and content of requests for investigation will be in accordance with the guidance set forth in Appendix L to this Manual. Such requests normally will contain the requestor's views regarding whether wrongdoing is reasonably believed to be involved, the significance of such wrongdoing, the regulatory requirements believed to have been violated, the priority of the investigation (high, normal, or low), and the impact of the failure by OI to finish the investigation by the date that the requestor indicates is necessary. Field Office Directors and other OI personnel involved in approval of the initiation of investigations are required to review written requests for investigation carefully to ensure that the requestor has provided all the information required to make an investigative determination. Requests that lack this information should be returned to the requestor for additional staffing.

3.2.1.2 Investigative Thresholds. Once a determination has been made that the written request for investigation meets NRC requirements, then OI is responsible for an independent evaluation of whether the wrongdoing forming the basis of the request meets the threshold for investigations set forth in Appendix L. OI will normally initiate an investigation if:

1) The staff has found that the alleged wrongdoing has had or could have an impact on the public health and safety, the common defense and security, protection of the environment, or antitrust laws provided that these matters are within NRC jurisdiction; and

2) The Director, OI determines that there is a reasonable basis to believe that the matter involves wrongdoing; and

3) The Director, OI determines that there is sufficient information available to support the allegation to warrant initiation of an investigation.

In accordance with current Commission guidance, OI is required to seek Commission guidance prior to initiation of an investigation relating to the character or integrity of an individual within NRC jurisdiction.

3.2.1.2. Notification of Requestor. OI must notify the requestor within 30 days as to whether the matter has been accepted for investigation, and if so, the priority of the investigation and the estimated schedule. This notification must be in writing and normally will be done by the appropriate Field Office Director. Similarly, OI must advise the requestor of any substantial change in the estimated date of completion for the investigation. Note that Appendix L provides for a reclama process by the requestor in the event there is disagreement with an OI decision not to investigate, or the priority or schedule assigned to the matter by OI.

3.2.2. Initiation of Investigations Without Requests. Occasionally OI will learn directly of allegations, events, or developed information that in its view warrant investigation. Normally, such matters would be brought to the attention of the appropriate Regional Administrator or the EDO for a formal investigative request. However, there may be circumstances under which OI may elect to initiate an investigation without waiting for a formal request. One such circumstance could be where it is obvious that the matter is within OI jurisdiction and there is the need for exigent action. Yet another would be where there is disagreement between the Staff and OI as to whether a particular matter warrants investigation. Under these circumstances, Field Office Directors in consultation with OI:HQ (whenever practicable), may open an investigation without first seeking an investigative request. The appropriate Regional Administrator or the EDO will be informed of such initiations. Such allegations should be incorporated in the region Allegation Tracking System by OI in order to maintain a central focal point within NRC for tracking all allegations. In order to ensure that elements normally required to be found in a written request emanating from outside OI are documented, such self initiated investigations will be documented on the same form currently used by the Staff to request investigations and forwarded to the Director, OI. This documentation will be provided to the Commission by OI:HQ in the same fashion as Staff written requests are provided

Similar guidance pertains to situations where OI is conducting an inquiry which develops information indicating the need for a full-scale investigation. OI will assign a control number to the case by the submission of an Investigation Status Record (NRC Form 305). The case number will be derived by deleting the "Q" prefix from the inquiry number. As noted below, such changes will be reported to the Commission by OI:HQ in the same manner as the initiation of investigations.

3.2.3. Reporting Requirements. Investigative Policy 4 requires that OI inform the Chairman of the initiation of all OI investigations. All investigations and inquiries must be documented on an NRC Form 305, Investigation Status Record, which is then transmitted to OI:HQ normally within 1 working day of case initiation. Full-scale investigations are subsequently reported to the Commission by OI:HQ. Inquiries are documented on an NRC Form 305, but are not normally reported to the Commission unless they are upgraded to a full-scale investigation (see paragraph 1.5. d and e, this manual). As indicated above, OI will inform the Commission, the appropriate Regional Administrator, the EDO, and/or when warranted, appropriate staff offices when OI initiates an investigation on its own authority.

3.2.4. Board Notification of Allegations. The Commission has approved an agency-wide policy regarding notification of licensing boards, appeal boards, or the Commission of new and potentially important information which the technical staff believes to be relevant to one or more proceedings pending before the boards or the Commission.

This policy requires the channeling of such information to the Director of Licensing or the NMSS Board Notification Coordinator for further assessment and recommendation. OI procedures and responsibilities for handling such information are as follows:

3.2.4.1. OI Investigators. All allegations received directly by OI investigators from a source outside NRC, which may be subject to board notification, should be promptly transmitted to the appropriate NRC office. When received by headquarters investigators, they will be transmitted to NRR or NMSS. When received by field investigators, such allegations will be promptly transmitted to the appropriate regional office. The investigator should transmit the information through the cognizant OI manager within 2 working days. The Field Office should promptly inform OI Headquarters concurrent with the transmittal of the information to the cognizant regional office.* This policy applies regardless of whether the allegations will be handled through inspection or investigatory effort.**

All OI investigative personnel should view any information they may directly receive, not only from the perspective of its potential investigative merit, but also whether or not it may require a board notification.

3.2.4.2. Field Office Director. The Field Office Directors review allegations identified or received directly by investigators supervised by them. They transmit the allegations within 2 working days to the appropriate region staff or to the appropriate NRC headquarters office (NRR or NMSS).

The individual Operations Officers at Headquarters, OI, have the responsibility to transmit to the appropriate office any update information affecting a previously issued board notification. Alternatively, the Field Office Directors will ensure transmission of such updated information, when identified by the Field Office, to the OI Headquarters within 2 working days after its receipt.

The Deputy Director, OI, in consultation with the cognizant Field Office Director, reviews and concurs in board notifications initiated by NRR regarding allegations which are the subject of an OI investigation. This review is to ensure that the board notification is sufficiently informative but does not provide information which, if released, would compromise the investigation.

(For additional background information refer to Inspection and Enforcement Manual Chapter 1530, NRR Office Letter 19 (revision 1), NRR Office Letter 37, SECY-82-122, and SECY-82-340.)

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* The information is in turn provided to NRR or NMSS by the Region for further assessment to determine whether the information is a subject for board notification. If the information is a subject

for board notification and it relates to an OI investigation, OI Headquarters reviews the board notification to ensure that the information will not compromise the investigation.

** Allegations received from an outside source that are not subject to this procedure shall also be promptly transmitted to the appropriate region or office either by the Field Office Director or OI Headquarters.

3.3. Development of Investigations

3.3.1. Evaluation and Prioritization. The initial phase of an OI investigation requires steps to:

a. evaluate the extent, scope, and nature of the allegations;

b. determine which specific NRC requirements have been potentially violated, and if the wrongdoing falls within the investigative purview of OI; (This is normally provided by the Staff in the written request for investigation although some additional OI research may be required.)

c. formulate an investigative plan of action (essentially a "pending list") based on the elements which constitute the violation with a view toward determining if the violation was committed deliberately; and

d. assess the priority in terms of time and resource allocation.

3.3.2. Identifying the Scope of the Investigation. The first step in any OI investigation (or inquiry) is to identify the scope, exact nature, and full extent of the allegations. Normally this will require interview with the alleger or complainant. The alleger or complainant should be interviewed as soon as reasonably possible after an allegation has been identified by OI or referred to OI for investigation, normally within 10 working days. It would be premature to attempt to prioritize an investigation prior to fully evaluating the extent and nature of the allegations in question through such an interview.

3.3.3. Identifying the NRC Requirements which may have been Violated. The next step in the OI investigation is to determine which, if any, specific NRC requirements may have been violated. The requester is required to provide this information at the time of the initial request. However, without an OI or joint OI/staff interview of the alleger/complainant, this initial assessment of the violation may not be complete. In any case, the OI investigator must become directly involved in this process and not take for granted that an initial staff assessment completely covers all possible areas of violation. In developing this second initial phase of an investigation, an OI investigator should, when needed, consult with counsel or staff personnel whose professional knowledge and position in the organization can assist the investigator in identifying potential violations which may exist. In order to ensure that the information provided represents an organizational rather than a personal view, such consultation normally will be at the level of division director or above.

The investigator should make his or her strongest efforts to identify specific potential violations and their safety significance. The elements of proof of the fully expanded, developed, and identified potential violations will then form the foundation of the investigative plan. This process will also assist OI Field Office Directors in properly allocating time and resources to the investigation or inquiry. Of course, should this process produce no legitimate indication of violations of NRC requirements, the allegations may be insufficient to warrant further time or investigative effort. Such allegations should be closed without further action, or referred back to the NRC staff for appropriate follow-up through their channels.

3.3.4. Formulating an Investigative Plan of Action. The investigator should determine what specific elements constitute each possible violation. The objective is to separate the alleged violations into component parts so that the investigator can target his activities on acts of commission or omission which would constitute wrongdoing. Furthermore, the investigator should formulate a hypothesis to explore all possible acts, documentation or circumstances which could either prove or disprove that such violation was committed knowingly and deliberately.

An "investigative plan" should be constructed listing interviews to be conducted, documentation to be reviewed and/or collected, etc. This document is a flexible, informal case management plan. The plan provides the investigator with an informed approach for assembling material facts related to the allegations, and at the same time provides OI management a basis to evaluate and modify, when warranted, an investigative approach proposed by an investigator. The investigator should use the same approach at any time during the investigation when investigative findings surface additional potential violations not contained in the original allegation(s).

3.3.5. Indications of Willfulness in Connection with Violations of NRC Requirements. The following list provides several factors to consider in attempting to identify whether there was willfulness behind an act or series of actions. If an NRC requirement is breached by a regulated entity by other than mistake or error, OI will assume that there is some degree of willfulness involved in the breach. This list is not meant to be all-inclusive due to the varying nature of the violations surfaced in OI investigations. Among the possible factors are:

a. Prior knowledge of the requirements by responsible personnel (expertise in the nuclear industry, position, and responsibility of the individuals within the organization, etc.);

b. Documentation showing prior knowledge of wrongdoing and failing to report;

c. Being placed on notice of non-compliance from some source and failing to take corrective action;

d. A record of some past similar experience indicating that the licensee, entity, or individual knew the act was wrongdoing, yet proceeded regardless;

e. Documentary or testimonial evidence mitigating against [~~eliminating~~]

the possibility that the violation resulted from accident, worker carelessness, ignorance, or confusion;

f. Attempts at deception by a licensee or contractor, such as

- -- watering down facts given to NRC,
- -- failure to record/document reports of non-compliance,
- -- efforts to contain, divert, or stop information from reaching NRC,
- -- efforts to segregate, isolate, transfer, fire, intimidate, or otherwise retaliate or discriminate against allegers surfacing or attempting to surface information of interest to the NRC, or for providing safety-related information to employers, and
- -- manipulation of documentation to confuse or hinder investigation/inspection efforts by NRC;

g. Documentation or testimony directly demonstrating that licensee management knew an act was wrong and against NRC requirements, but proceeded regardless;

h. Any evidence of acts committed in the name of "expediency," with later claims that the commission was a result of confusion on the part of the licensee; and

i. Falsification of documents.

3.3.6. Standards of Investigative Thoroughness. OI conducts investigations to determine if there was a deliberate breach of an NRC regulatory requirement. The results of such investigations are normally used as the basis for NRC regulatory actions such as licensing decisions or enforcement actions. Consequently, the investigator must pursue and develop all relevant investigative leads in enough detail and depth to provide NRC decision-makers sufficient information to make an informed decision. It is particularly important for investigators to gather as much information as possible regarding the willfulness of violations uncovered during investigations as this issue is of great importance to the regulatory process.

When an OI investigation begans to demonstrate the willful violation of an NRC requirement, it will often become apparent that a criminal statute has been violated in addition to the alleged breach of NRC regulatory requirements. Investigators will complete the investigation in order to satisfy the regulatory needs of the NRC. On completion, OI will refer the matter to the appropriate government agency in accordance with Chapter 8 of this manual. Investigators will not continue an investigation solely for the purposes of further perfecting a criminal violation except at the direction of OI:HQ.

3.3.7. Case Management. The above discussion describes the initial phases of an investigation or inquiry. The investigative plan should be under continual change, revision, and modification during the entire course of an investigation, as a result of case review by the investigator or supervisor or as new information is developed. The investigator has the responsibility to keep the plan current and follow through with the development of identified leads. The Field Office Director has the responsibility to conduct a review of the progress of ongoing cases and discuss the direction of investigative efforts with the investigator at least monthly. This review will be documented in the case file.

3.4.1. Termination of Investigations. Appendix L also contains guidance regarding the criteria for termination of investigations. All OI personnel are to comply fully with this guidance. It is also useful to discuss briefly the standard of proof generally used by the NRC in its regulatory actions and its relationship to the investigation. The normal level of proof is a "preponderance of evidence" as opposed to the criminal standard of proof "beyond a reasonable doubt". In lay terms, it requires more evidence to prosecute using the criminal standard than it does to prosecute using the civil standard of preponderance of evidence. In practical terms, however, it has little bearing on a decision as to when to terminate an investigation.

In practice, it is difficult enough for the courts, let alone an investigator to discern sharply between the quanta of evidence needed for either standard. At the same time, there has been a tendency on the part of NRC users of OI reports of investigation to request a greater amount and quality of evidence in matters involving willful violations, especially by individuals. Consequently, investigators should not concern themselves during investigations with the distinctions between levels of proof. Rather, investigations should be conducted in accordance with existing standards of thoroughness and objectivity with a view to collecting all evidence readily susceptible to the investigative process that tends to prove or disprove the wrongdoing that is being investigated. When an investigator is confident that he or she has gathered all the evidence that is attainable and necessary for the objective adjudication of the matter, the investigation should be terminated. OI managers will be responsible for monitoring this process to ensure that OI investigations continue to provide sufficient information to support NRC's regulatory needs.

CHAPTER 4

INTERVIEWS

4.1. General

Interviewing is the primary method of obtaining evidence and investigative leads. In conducting interviews the following guidelines apply:

a. All interviews will be conducted in a fair and impartial manner with the objective of obtaining the most accurate, relevant, timely, and complete information from the source.

b. The investigator shall fully identify himself/herself at the start of the interview.

c. The investigator will obtain pertinent identifying data from the interviewee including, but not limited to full name, personal/business addresses, and occupation.

d. When conducting an interview, the investigator should give particular attention to obtaining the interviewee's observation of incidents, in addition to the interviewee's knowledge of the actions or statements of other persons connected with the event.

e. The investigator will document all interviews in the appropriate OI reports and no investigator will intimate or state otherwise to the interviewee.

f. Telephonic interviews should be held to a minimum. However, where personnel, financial, time, and/or geographic considerations preclude personal interviews, telephonic interviews may be conducted provided that all necessary information can be obtained through this method. Telephonic interviews must be clearly identified as such in the ensuing report of investigation or inquiry.

g. Ideally, interviews should be conducted by two investigators; however, the realities of OI resource constraints will generally result in interviews being conducted by one investigator. Notwithstanding resource constraints, two investigators should conduct the interview when there is a reason to believe that the interviewee is: (1) hostile; (2) believed likely to provide false or perjured information; (3) the target of an investigation; (4) in a location where the investigator could be in danger; or (5) considered dangerous. When specific technical expertise is required for the interview or when deemed appropriate due to other unusual circumstances, an investigator may be accompanied by a colleague or other NRC employee.

h) Interviews of female witnesses by one investigator or the reverse situation in the case of a female investigator interviewing a male presents special difficulties. In either instance, the investigator could be subjected to charges of sexual harassment that are difficult to refute in the absence of witnesses unless he or she takes certain precautions. The most obvious is to conduct interviews using two investigators. If a second investigator is not available and the interview cannot be delayed until one is, then the investigator should select another person of known reliability to sit in on the interview as a witness. Typically this would be another NRC employee, usually an inspector. In the case of a male interviewing a female, a female secretary employed by the NRC or another government agency could be an appropriate alternative witness. Such interviews, to the extent practicable should be conducted in locations that are appropriate for the conduct of business. Thus, it is better, if possible, not to interview a person of the opposite sex alone in their residence or in a motel room if a more neutral location is available. If conditions dictate the use of the residence or motel room, investigators are urged to arrange for a court reporter to transcribe the interview, or as a minimum, to tape record it. In sum, as experienced professionals, OI investigators are assumed to be aware of the special problems attendant to such interviewee and to take such reasonable steps (the above are only illustrative) to reduce their vulnerability as a result of such interviews.

h. The investigator should plan all interviews ahead of time including a review of all known information and formulation of anticipated questions.

4.2. Miranda Warnings

Miranda warnings are the warnings required to be furnished to criminal suspects by arresting police officers under the Supreme Court decision of *Miranda v. Arizona*, 384 U.S. 436 (1966) and related rulings. The question arises whether an investigator should give these warnings to persons whom they interview because those persons may have violated criminal statutes as well as NRC regulations.

Miranda warnings will not be furnished by OI investigators to persons interviewed during the course of OI investigations unless (1) the interviewee is in custody or (2) The Director/Deputy Director, OI directs that such warnings be given because of some special circumstance. A person is in custody if incarcerated, under arrest, or otherwise significantly deprived of freedom for any reason, even if it is not related to the matter being investigated. As OI investigators under normal conditions do not interview persons who are in custody, Miranda warnings are rarely required.

Any questions regarding the issue of Miranda warnings that arise during an investigation should be directed to OI Headquarters for resolution. In those instances where OI investigators furnish Miranda warnings, the format at Appendix D is used. Completion of this form is self-explanatory.

In addition to the limitations on providing the full Miranda warnings, OI investigators will normally not advise persons in noncustodial interviews that they may be represented by counsel. However, interviewees do have the right to have counsel if they wish it and investigators will not tell individuals being interviewed that they cannot employ private counsel for consultation and/or attendance at such interviews.

4.3. Administering Oaths or Obtaining Affirmations

The Commission has the authority to administer oaths and obtain affirmations in connection with its investigations. That authority has been delegated to the Director, OI, and redelegated to all OI investigators. See Section 161(c) of the Atomic Energy Act of 1954, as amended; 42 U.S.C. 2201(c).

4.3.1. When to Administer an Oath or Obtain an Affirmation. The point at which an oath is administered depends upon the circumstances surrounding the interview. As a general rule, it is more advantageous to complete the interview and obtain as much information as possible before administering the oath or obtaining affirmation. However, there may be instances in which it would be beneficial to place the individual under oath before the interview. The investigator must judge each situation accordingly.

4.3.2. Procedures for Administering an Oath or Obtaining an Affirmation. The guidelines for administering oaths and obtaining affirmations are located at Appendix E.

4.4 Subpoenas

Most investigations are accomplished without the need for compulsory process, because most interviews and evidence are given voluntarily. When individuals or entities fail to cooperate, OI may compel the attendance and testimony of witnesses and/or the production of evidence by subpoena.

4.4.1. Authority. NRC is authorized to issue subpoenas in support of investigations. That authority has been delegated to the Director, OI. See Section 161(c) of the Atomic Energy Act of 1954, as amended, 42 USC 2201(c).

4.4.2. Format of OI Subpoenas. A sample subpoena has been provided at Appendix F as guidance in completing subpoenas. OI elements will use this format.

4.4.3. Use of the Subpoena. An NRC Order should normally be used to compel information from a licensee. If an order is not considered appropriate in a particular investigation, OI can issue subpoenas to compel the attendance and testimony of witnesses or the production of physical and/or documentary evidence or both. OI will not use subpoenas in situations where voluntary cooperation is readily obtainable through reasonable accommodations such as scheduling interviews at mutually convenient times and places. However, investigators must not accommodate persons or entities to the point of compromising investigations. Normally, OI investigators will not request a subpoena until cooperation has been refused. However, in exceptional cases (e.g., where evidence may be tampered with or where a high probability exists that the investigator's request will be refused) OI may issue subpoenas before cooperation has been refused.

There are several general limitations on the use of subpoenas. Subpoenas must be issued in good faith and the information sought by the subpoena must be relevant to the OI investigation. Moreover, the subpoena must be reasonable. This means that the time and place of interview must be reasonable, any demand for documents or other tangible evidence must be reasonable, and the subpoena must describe the information sought with reasonable particularity.

4.4.4. Subpoena Approval Guidelines. The Director, OI (or Acting Director), shall issue all OI subpoenas. Whenever practicable, the Field Office Director shall request the subpoena by memorandum to the Director, OI and attach a draft subpoena to the memorandum. The memorandum requesting the subpoena should address:

a. details of the situation and need for the subpoena, i.e., the refusal of the person or party to cooperate,

b. the information or documentation desired,

c. a coordination with the NRC staff to determine that the desired information/documentation is not already available within NRC,

d. what other means are available to obtain this information,

e. the need for personal service if service by mail is not desired,

f. the address of the individual or entity to be served with the subpoena, and

g. a return date with sufficient and reasonable lead time (at least 2 weeks from the anticipated date of issue of the subpoena).

Upon receipt of a request for a subpoena, OI Headquarters will notify OGC and the Commission. OI Headquarters will prepare the approved subpoena for the signature of the Director or Acting Director, OI. The requesting Field Office Director should allow sufficient time for the approval process.

When a written request is not practical because of time constraints or other case-unique problems, the investigator may request a subpoena by telephone, from OI Headquarters. This will shorten the approval time considerably. The investigator must then provide OI Headquarters with the same information as required in written subpoena requests. The originating OI office will follow-up its oral request in writing, citing the telephonic contact and notifying OI Headquarters of results achieved from the subpoena.

4.4.5. Service of Subpoenas. After subpoenas are authorized, they must be delivered to ("served upon") the person or legal entity named in the subpoena. Subpoenas must be served in a particular manner to ensure enforceability in court. OI subpoenas may be served either by mail (certified or registered with "restricted delivery" and "return receipt requested") or by personal delivery.

OI will routinely use mail to serve subpoenas unless there are reasons for preferring personal service, such as insufficient lead time or evasion of mail service. Subpoenas to be served by mail will normally be dispatched by OI Headquarters via certified mail. Delivery will be restricted to the person named on the subpoena. An additional copy of the subpoena will also be sent to the named person or entity by regular mail channels.

If OI Headquarters determines that personal service is warranted, the subpoena must be served in the following manner:

a. Service upon an individual must be made by personally delivering the subpoena to that person.

b. Service upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, must be made by personally delivering the subpoena to an officer, to a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process.

c. Personal service (delivery) may be made by any person not less than 18 years of age.

d. Normally, such service will be made by an NRC employee. OI Headquarters must approve the use of a non-Federal employee.

e. Care must be taken to ensure that anyone serving a subpoena is aware of the procedures necessary to effect proper service.

In order to complete the procedure for service of a subpoena, proof of the service must be provided to the Director, OI. Service may be documented in two ways: by the acknowledgement of the person served or by the certification of the person making personal service. Whenever practical an acknowledgement should be obtained. The U.S. Postal Service receipt will serve as the acknowledgement for a subpoena sent by certified or registered mail with restricted delivery, because only the addressee is permitted to sign for such mail. Receipt of subpoenas that are personally served may be acknowledged on the back of the subpoena. Whenever an acknowledgement cannot be obtained, the person serving the subpoena shall establish proof of service by executing an affidavit on the back of the subpoena. The affidavit will identify the person served and the date and place where served.

4.4.6. Compliance with Subpoenas. The investigator must meet the person named in the subpoena at the designated time and place. If the subpoena requires the production of either physical or documentary evidence, the original of the evidence must be produced, unless the subpoena specified that a copy (as in the case of documents) would be acceptable. A person compelled to submit documentary evidence is entitled by law (5 USC 555(c)) to retain a copy of such evidence.

If the subpoena requires the named person to appear and testify, the investigator will conduct an interview of the person in the normal manner. In such instances serious consideration should be given to the use of a court reporter, or, at a minimum, a taped interview. OI does not require an NRC attorney to attend these interviews, although OI may request such assistance in appropriate circumstances. OI investigators should normally be accompanied at such interviews by at least one other Government employee. A person compelled to provide testimony is entitled by law (5 USC 555(c)) to obtain a copy of the results of such testimony. However, for good cause, the person may be limited to inspection of the testimony during the pendency of the investigation.

A person compelled by subpoena to testify to OI is entitled by law (5 USC 555(b)) to be accompanied, represented, and advised by counsel or other personal representative (see paragraph 4.5, this manual). This right is subject to the limitation that under certain circumstances it may be possible that counsel representing another party at interest could be excluded (see paragraph 4.5., this manual). In that event, the interviewee is entitled to secure other counsel. Interviewees must still answer the investigator's questions directly--not through counsel. Counsel may not cross-examine the interviewee. An investigator may discuss matters with counsel, if it is expedient. Examples of reasons for such discussions would be the need to clarify procedural matters or the need to determine the basis for any refusal to answer specific questions.

An interviewee may not refuse to answer a question because the answer would be personally embarrassing, adversely affect a friend, cause him/her to lose a job or license, or reveal trade secrets or confidential information. An interviewee may invoke any of the testimonial privileges recognized by Federal law, e.g., self-incrimination. When the privilege asserted is the privilege against self-incrimination, a special procedure is available to compel the otherwise privileged testimony upon the grant of "use immunity."

The investigator must report to OI Headquarters any refusal to produce evidence or answer questions in compelled interviews. The investigator may at his/her discretion, either suspend the interview upon encountering such a refusal or continue with other areas of questioning and contact OI Headquarters thereafter.

4.5. Exclusion of Third Parties from Interviews

Interviews are to be conducted during investigations under conditions that enhance the investigator's ability to ensure that NRC obtains full, complete, and accurate information. Individuals being interviewed will normally be permitted to have a personal attorney or other personal representative present during interviews. However, if the personal attorney or representative also represents another potential interviewee or the company being investigated, the investigator will contact OI headquarters and a case-by-case determination shall be made whether to exclude the personal attorney or representative on conflict of interest grounds. Normally, OI will not permit other third parties, such as licensee management or union stewards, to be present during interviews. OI Headquarters will resolve requests for the presence of persons other than personal counsel on a case-by-case basis after consultation with OGC.

4.6. Tape Recording Investigative Interviews

The use of stenographic reporters or tape recorders during interviews will be at the discretion of the investigator. They will not normally be used due to the impediment they may pose to the free flow of information. Requests by an interviewee to have an interview recorded will be dealt with on a case-by-case basis. The investigator may either allow taping or terminate the interview. The NRC normally will make the tape if an interview is recorded, and will not provide the interviewee a copy of the tape before the investigation has been completed.

CHAPTER 5

DOCUMENTING OI INVESTIGATIONS

5.1. Documenting Formal Investigations

The results of all OI investigations are documented in a Report of Investigation (ROI). The ROI is the principal OI product which is furnished to other NRC components. When appropriate, OI will make the ROI available to licensees and to the public after deletion of exempt material. The ROI must be written in sufficient detail to enable the appropriate NRC officials to apply the facts obtained in the investigation in their decision making. All pertinent documentation will be appended to the ROI and all persons contacted will be fully identified.

5.2. Preparation of the Report of Investigation

Guidelines for the preparation of Reports of Investigation are contained in Appendix G. To further assist in the writing of such reports, a sample ROI is contained in the same appendix.

5.3. Reports of Inquiry

Not all information or allegations brought to the attention of OI result in a formal investigation, and hence documented on an ROI. Some allegations may be properly addressed by routine or special inspections within NRC staff channels, while others may be resolved by having an OI investigator conduct a brief inquiry. Guidelines on the preparation of Reports of Inquiry are contained in Appendix G. These guidelines essentially follow the format of an ROI.

5.4. Case Chronology

A chronological record of investigator and supervisory activity for each OI investigation/inquiry will be maintained in the case file. The record will be started upon initiation of an investigation/inquiry and continue until the matter is closed. The record's purpose is to document all case-related activities, some of which may not be included in the final report, and to allow reconstruction of the manner in which an investigation or inquiry was being conducted in the event responsibility is transferred to another investigator. To avoid duplication, entries will, when possible, refer to other documents (statements, reports of interview, memorandums, etc.) in the case folder. Otherwise, entries must be in sufficient detail to provide a complete understanding of the action. The case chronology should be used to record investigator or supervisory reviews, instructions given by supervisors, administrative processing data, contacts, coordination with NRC staff and other agencies, the fact that interviews or records reviews were conducted, etc. A sample of the format and content of the case chronology is at Appendix H.

5.5. Statements

When conflicting information is anticipated from various witnesses and/or when it is deemed necessary to "freeze" in time the witness' testimony, signed statements should be obtained. The first paragraph should, as a minimum, include the name and identifying data concerning the investigator and the individual (address and telephone number), the date and place of the statement, and acknowledgment that the statement is voluntary. The following is an example of a preamble which may be used for signed statements:

Page ___ of ___

Place: ________________________
Date : ________________________

STATEMENT

I, __________________________, hereby make the following voluntary statement to ____________________, who has identified himself to me as an Investigator with the U.S. Nuclear Regulatory Commission. I make this statement freely with no threats or promises of reward having been made to me. Investigator __________________ is writing/typing this statement with my permission.

A discussion of the jurat at the end of a statement is contained in Appendix ___ of this manual, which addresses the administering of oaths and obtaining of affirmations.

5.6. Report of Interview

If an interviewee declines to render a written statement, but is willing to answer questions, or if the case investigator considers that an interviewee's testimony does not warrant a written statement, the investigator will document all significant and relevant information developed during the interview in a Report of Interview. Reports of Interview should normally be dictated within 5 days from notes taken at the time of the interview. In any case, such reports should be dictated no longer than 10 days after completion of the interview. This will enhance the recording of complete and accurate information.

As a minimum, the Report of Interview will show the date and place of the interview; the identity of the investigator(s) who conducted the interview; file numbers; the date dictated, prepared, and transcribed; the identity and address and phone number of the individual interviewed; the subject matter leading to the interview; and the type of warning(s) given to the individual interviewed, if any. A complete summary of the interview will follow. Completed Reports of Interview will be placed in the case file. Separate reports normally will be prepared for each productive interview. However, a series of interviews where essentially the same information is obtained, or a series of interviews which fail to develop any pertinent information may be documented collectively on a single Report of Interview.

5.7. Transcribing Interviews Through a Court Reporter

In some instances, the use of a court reporter to transcribe an interview might be more appropriate than either a written statement or a Report of Interview. Examples of such circumstances include compulsory testimony in compliance with a subpoena, situations where the issues are highly technical, interview of a female witness by one male investigator (or of a male witness by a female investigator), where there is a need for accuracy in a lengthy or complicated interview, in some confrontational situations, or where it is necessary to interview a senior level management official. The decision to use a court reporter is left to the discretion of the investigator and the OI Field Office Director.

However, when court reporters are used, the investigator must ensure that a clear understanding exists regarding ownership, security, and distribution of the transcripts. Copies of transcripts are not to be distributed by the reporting service to other than the investigator who contracted for the service. The interviewee is entitled to a copy of his/her testimony if compelled to testify, but, for good cause, the investigator may limit the interviewee to a viewing of the transcript until after the investigation is completed. See 4.4.6 and 4.6.

At the beginning of such an interview, the same data identifying the interviewee should be placed on the record as on a written statement. See 4.1(c).

5.8. Investigative Notes

Whether or not to take notes during an interview (or other investigative activity) is a decision left to the discretion of the investigator. However, contemporaneous notes made by an investigator during an investigation will certainly promote an accurate, effective, and thorough investigative product.

The term "notes" includes handwritten notes, dictated notes, and other work papers made during an investigation. This term also includes documents prepared outside of but derived directly from an investigative activity. Notes should contain the dates and locations of record reviews, contents of interviews, or other activities. They should fully identify persons interviewed, other individuals present, and persons who provide assistance or documentation to investigators. Finally, the notes should record the existence of unusual conditions or other developments which may impact upon the investigation.

5.8.1. Method and Amount of Note Taking. The method of taking notes is left to the discretion of the investigator. The amount of note taking will vary with the circumstances. Friendly witnesses will seldom object to notes being taken during an interview. On the other hand, hostile, or indifferent witnesses may be reluctant to provide any information, or worse, may hold back important information if they observe the investigator taking down notes of their verbal remarks. The investigator's experience, an assessment of the witness, and the on-the-spot reactions of the interviewee will dictate the extent of note taking.

5.8.2. Retention of Notes. Investigators must preserve any notes taken, even informal notes. The first page of any logical grouping of notes is to be signed and dated by the investigator and the related pages are to be stapled or bound together in a suitable fashion.

Upon completion of the investigation, the notes are to be placed in one or more envelopes. The envelopes are to be labeled, both back and front, with the name of the case, the case control number, and the title "Investigator's Notes." The envelopes are to be sealed and placed in the investigative file.

5.9. Retention of Draft Documents

In the absence of an ongoing FOIA or Privacy Act request pertaining thereto, all drafts prepared by OI personnel will be destroyed upon completion of the final written document. As a draft of a Report of Investigation, Report of Inquiry, memorandum, or other OI document undergoes revision, the initial or any intermediate drafts will be destroyed upon preparation of the next draft or final product. For example, a sequence would begin when an investigator prepares a rough draft report. After review, the investigator requests that a final draft be typed. Upon supervisory review of the final draft, the field office produces a final report and submits it to OI Headquarters for review. Minor revisions may require that the final report submitted to headquarters be modified; thus, the submitted final differs from the final report ultimately issued by OI Headquarters. In this example, the rough draft would be destroyed when the final draft is completed, and the final draft destroyed when the final report is produced by the originating field office. If changes are required after the headquarters review, the final report submitted by the field office is destroyed upon completion of the final report which is signed by the Director, OI, and issued by OI Headquarters.

5.9.1. Active FOIA and Privacy Act Requests. The exception to the draft destruction policy involves an outstanding FOIA or Privacy Act request for "any or all" documents associated with a particular investigation or action. All documents, draft or otherwise, that exist on the date of the FOIA/PA request must be preserved and added to the inventory list provided to OI Headquarters. This provision does not apply to drafts prepared subsequent to the date of the FOIA/PA request.

Retention of drafts in existence at the time of FOIA/PA requests is required by law even if the drafts in question were in OI files only because of administrative error; i.e., because the responsible employee failed to destroy them in accordance with the requirements set forth above.

Guidelines for responding to FOIA requests are contained in Appendix I.

5.9.2. "Personal" Copies of Drafts. OI employees will not keep personal copies of drafts of reports or other official documentation. These drafts are legally NRC records regardless of their location. The fact that a draft is at an investigator's residence or other location outside the NRC does not exempt it from the reach of subpoenas or orders granting judicial or administrative discovery motions.

5.9.3. Disagreements Regarding the Content in Draft Documents. OI employees may disagree with revisions made during management review of reports or other official documentation. Such disagreements should be voiced at the time through the appropriate chain of command. The draft in question may be retained until a final decision is reached regarding the employee's objections. If an agreement is reached, the draft will be destroyed. If the employee still disagrees with the final OI management decision, the employee should prepare a memorandum to the files of OI documenting the reasons for disagreement. The draft(s) in question should be appended to the memorandum and placed in the appropriate official OI file. (This procedure is not intended to preclude an OI employee's right to make use of the NRC Differing Professional Opinion procedures if the employee so chooses.)

5.10. Case File Management

All material placed in the case file will be affixed to the folder in chronological order. When the information concerning a case becomes too voluminous for one folder, an additional folder is set up. Such folders are then designated 1 of 3, 2 of 3, 3 of 3, as necessary. All OI investigation case file folders are organized as outlined below:

Position in Folder	Attachment
Inside front cover	Case opening documents Monthly status reports Other updating reports Case chronology record Investigative plan
Front facing divider	Memoranda to file Notification of Case Opening Telephone conversation records Case-related correspondence Transmittal Correspondence
Back-facing divider	Congressional Correspondence Media Articles Enforcement actions Other pertinent correspondence
Inside back cover	Department of Justice or other referral correspondence

Accordian folders will be placed directly behind the blue folder in the following sequence:

(1) Accordian Folder	Report of Investigation with Attachments

	Copies of transmittals
(2) Accordian Folder	Board Notification Terrorism Sabotage threats Policy issues-SECY Papers Other pertinent information
(3) Accordian Folder	Background information Investigator's notes

All material will be filed chronologically. Additional folders may be used when the volume of materials warrants.

OI Inquiry files will be set up as set forth, below:

Inside Front Cover	Request for Inquiry Monthly Status Report
Front Facing Divider	Related Correspondence Inspection Reports
Back Facing Divider	Telephone Conversation records
Inside Back Cover	Report of Inquiry

All the above material will be filed chronologically.

5.10.1. Investigator's Working File. The case investigator is authorized to prepare and use a working file during ongoing investigations. This file will be identified as "Working File" with the case number. It will not contain original documentation other than the investigator's notes, the case chronology record, and the investigative plan, all of which are used on a daily basis by the case investigator. The working file will be destroyed after completion of the field work and final report. The original documents described will then be placed permanently in the official case file folder.

5.10.2. Retention of File Material in Individual Offices. Original official file copies and other original documentation will not be retained in an individual's office. This serves to preserve and better account for the original documentation, and facilitates FOIA searches. It is imperative that OI files be kept complete in the official folders, since the alternative is that each future FOIA request would require a complete and thorough search of all investigator's offices in the field and at headquarters.

CHAPTER 6

COLLECTION, CUSTODY, AND PRESERVATION OF EVIDENCE

6.1. General

The collection of evidence is a fundamental investigative technique. There are instances where the role of physical evidence is extremely important to the resolution and prosecution of the matter under investigation. Thus, it is especially important to collect and handle evidence in accordance with recognized legal and professional standards. The specific procedures to be followed by all OI investigators who become involved with the collection, receipt, handling, or disposition of evidence are stated in the following paragraphs. These procedures do not apply to original written statements obtained by OI investigators during the course of investigations, since these are self-authenticating.(They should, of course, be safeguarded adequately.) These procedures do apply to all other original or best evidence copies of documentary evidence obtained during investigations, as well as all physical evidence collected during investigations.[, ~~even if DOJ referral is not anticipated~~.]

6.2. Appointment and Duties of Evidence Custodians

Each Field Office Director will appoint a primary and alternate evidence custodian in writing. Either the primary or the alternate custodian must be an investigator other than the Field Office Director. Use of administrative personnel as custodians is authorized, but not as both primary and alternate. A copy of each appointing document will be kept in the field office evidence depository. The appointing documents will be brought forward for filing each calendar year that the primary and alternate evidence custodians retain their positions.

6.2.1. Primary Evidence Custodian. The duties of the primary evidence custodian are as follows:

1. Account for, preserve, safeguard, and dispose of all evidence received by the Field Office.

2. Establish an evidence ledger and in it maintain all evidence records.

3. Protect evidence from loss, deterioration, and damage.

6.2.2. Alternate Evidence Custodian. The alternate evidence custodian assumes all duties of the primary evidence custodian during any temporary absence of the primary evidence custodian.

Upon assuming duties of the primary evidence custodian, the alternate evidence custodian enters and signs the following statement in the evidence ledger, immediately below the last entry:

I, ________(Name)__________, on ________(Date)__________, assumed all duties of the primary evidence custodian during the temporary absence of the primary evidence custodian. I accept responsibility and accountability for all evidence contained in the field office evidence depository.

________________(Signature of Alternate Evidence Custodian)________________

Upon return from temporary absence, the primary evidence custodian ensures that all entries on records that pertain to evidence taken in, released, and disposed of by the alternate evidence custodian are correct and accurate. After ensuring that the records are correct, that all the evidence is accounted for and properly documented, the primary evidence custodian enters the following statement in the evidence ledger, immediately below the last entry:

I, ______(Name)______________, on ________(Date)__________, resume my position as primary evidence custodian and accept responsibility and accountability for all evidence contained in the field office evidence depository.

________________(Signature of Primary Evidence Custodian)________________

If at any time it is found that evidence has been lost, wrongfully disposed of, or an erroneous entry has been made pertaining to the evidence, the Director of the Field Office must be immediately informed.

The evidence custodian should prepare a memorandum outlining the error and what was done to correct it.

6.2.3. Changing Primary Evidence Custodians. If the primary evidence custodian is absent for an extended period or if the office is changing primary evidence custodians, a complete inventory of evidence contained in the depository should be conducted by both the incoming and outgoing custodians, and so noted in the evidence ledger. A newly appointed primary evidence custodian should also make a notation of his assumption of duties and responsibility in the evidence ledger with his signature, as follows:

I, ________(Name________, on ________(Date______, having conducted a satisfactory inventory, hereby relieve ____________________, and assume all duties of the primary evidence custodian. I accept responsibility and accountability for all evidence contained in the field office depository.

________________(Signature of Primary Evidence Custodian)________________

6.3. Evidence and Property Processing

The investigator who assumes initial custody of evidence immediately marks the evidence for future identification. If possible, a permanent mark is placed directly on the item. If this is not possible, the investigator shall place the evidence in a container that can be sealed and marked. The marking includes the time and date of acquisition and the initials of the person who assumes custody of the evidence.

An Evidence/Property Tag or its equivalent is attached to each item of evidence to identify it and provide for control. Only one tag need be used when items are grouped together (for example, a box containing component parts) and listed as one item.

A record of the chain of custody of all physical evidence is made, regardless of how it is obtained. The investigator who first acquires, marks, and tags the evidence is also responsible for preparation of the Evidence and Property Custody Document. Guidelines for preparing this document and further processing/accountability of evidence are contained in Appendix J.

Each OI Field Office will prepare an Evidence Ledger for physical evidence received by that office, to provide accountability through cross-reference with Evidence/Property Custody Documents. Guidelines for preparation and maintenance of an Evidence Ledger are also contained in Appendix J.

6.4. Handling of Fungible Evidence

Items which lack individual characteristics and are not easily identifiable (fungible items) should be segregated and marked appropriately as evidence at the earliest possible time after acquisition.

After wet or damp fungible items have been visually examined and allowed to dry, they are sealed in a container. The container may be paper or manila envelopes, cardboard boxes, or wrapping paper. Avoid sealing in plastic containers. Do not use containers that show previous markings or seals.

When sealing fungible evidence in containers, the investigator should seal all openings, joined surfaces, and edges with paper packaging tape or equivalent; cellophane or masking tape is not used. The investigator should then place the following markings so that they appear on both the tape and package:

a. the time and date of sealing,

b. the initials or signature of the initial custodian, and

c. the OI case control number.

Items such as small amounts of powder, hair, fiber, small paint chips, or flakes are not placed in plastic bags. Such small materials tend to adhere to the inside of a plastic bag because of static electricity. They should be placed in paper wrappings, cardboard containers, or plastic or glass vials.

There is no requirement to seal nonfungible evidence. However, it may be sealed if desired and handled in the same manner as fungible evidence.

6.5. Maintenance of Evidence

Evidence is stored in an evidence depository so that the integrity and physical characteristics are maintained. This depository is normally an office safe or security cabinet of adequate size and is designated solely for evidence. Items such as metal objects are kept in a clean, rust-free condition to preserve their value as evidence.

Fingerprint cards obtained for comparison may be maintained in the proper case file instead of the evidence depository. When OI sends these cards to a laboratory for comparison with other evidence from the depository, the card need not be listed on an Evidence/Property Custody Document. The description on the laboratory request is enough to connect the card with the evidence. Replace the fingerprint card in the proper case file when returned by the laboratory.

Documents that may directly prove or disprove a point in question are kept in the evidence depository. Such documents may include forged or altered documents, and other questioned documents, along with related standards or exemplars. Statements (including confessions) and copies of documents routinely associated with an investigation are kept in the case file and not in the evidence depository. Tape recordings of confessions or admissions are maintained as evidence. When necessary, large items may be kept in an impoundment lot, warehouse, or other reasonably secure place, so long as the items are properly marked and appropriate control is maintained.

6.6. Evidence Depository

A safe or filing cabinet with a combination lock and locking bar is used to secure evidence. Access to the safe or filing cabinet is restricted to the primary and alternate custodians.

Only the primary and alternate custodians know the combination of the lock to the evidence depository. However, copies of all combinations are recorded in sealed envelopes and forwarded to OI Headquarters for safekeeping.

Lock combinations are changed when the primary or alternate custodian is changed. All combinations are also changed if there is any indication of possible compromise.

The evidence depository is locked at all times when not in use by the evidence custodian. Only authorized personnel are granted access to the evidence depository and then only in the presence of the responsible evidence custodian.

CHAPTER 8

RELEASE OF INVESTIGATION INFORMATION

8.1. Nuclear Safety and Security-Related Information Developed in an OI Investigation

In an OI investigation or inquiry, the investigator is responsible for protecting the integrity of the investigative process. This responsibility includes controlling the release and dissemination of all information which may be germane to the matter under investigation. However, when the nature of this information is, or appears to be, related to nuclear safety or security or both, the investigator has the additional responsibility of immediately notifying the appropriate NRC officials so that corrective action may be promptly initiated.

8.1.1. Notification Process. When an OI investigation identifies a potential significant safety or security issue, the investigator will immediately notify the Director of the appropriate OI field office. The OI Field Office Director will have the responsibility to furnish the cognizant NRC Regional Administrator with all available information concerning the issue(s) in question. Notification may be an oral briefing to expedite transmittal. The Regional Administrator will determine the actual safety or security significance of the issue and any requirement for prompt corrective action. After consultation with the OI Field Office Director the Regional Administrator (or designee) may decide to notify the licensee, vendor, or other entity under investigation of those significant safety or security concerns requiring immediate action. However, the OI Field Office Director (or designee) should advise the Regional Administrator [~~with a view toward~~] to limit[~~ing~~] the release of information to the minimum necessary to protect the public health and safety.

After notifying the Regional Administrator of the safety or security issue, the OI Field Office Director will advise OI Headquarters at the earliest possible opportunity. The OI Field Office Director will prepare a written record of the OI notification which will include, but not be limited to, the nature of the information, the time and date it was provided to the region, to whom it was provided, and whether it was released outside NRC.

OI bears the responsibility of notifying the Regional Administrator of safety or security matters which arise during an OI conducted investigation or inquiry. When such matters surface during an inspection or inquiry conducted by a particular regional staff, even though OI investigators may have been asked to assist or participate, the responsibility for any notification remains with the regional personnel conducting the inspection or inquiry.

8.1.2. Threshold for Notification of the OI Field Office Director by an Investigator. The significance and immediacy of safety or security matters are the undisputed purview of the NRC technical staff. The threshold at which an investigator should notify the OI Field Office Director of a potential safety/security issue should be very low. When there is any doubt whatsoever, the investigator should transmit the information. This policy also applies to the notification of the Regional Administrator by the OI Field Office Director. OI will set aside [~~all~~] investigative compromise [~~concerns~~] or future enforcement/prosecutorial considerations when a Regional Administrator determines that notification of a licensee is necessary because of the immediate public health and safety aspects of the issue.

8.2. Release of Investigative Reports Outside NRC

8.2.1. Final Reports of Investigation or Inquiry. The Director, OI, must authorize release of all complete Reports of Investigation/Inquiry. This authorization includes:

a. public release of complete reports.

b. release of investigation reports to NRC licensing boards.

c. release of information contained in completed investigation reports or the reports themselves to the Department of Justice or other law enforcement agencies.

8.2.2. Referrals to Department of Justice and Other Agencies. Formal referrals to DOJ and other prosecutorial entities normally occur after completion of the OI investigation and the final ROI. These referrals occur when the investigation of a violation of an NRC regulatory requirement develops evidence which leads OI to suspect that the act(s) was committed knowingly and deliberately in violation of either a Federal, state, or local criminal statute. [~~Often this judgement is not clearly defined within the scope of the evidence.~~] When there is reasonable suspicion that a violation of a criminal statute has been committed, OI will refer the matter to the appropriate prosecutorial office for review and whatever action is deemed necessary.

8.2.2.1. Method of Referral. OI will refer matters falling within this category to DOJ or a state or local prosecutorial office by sending them a copy of the ROI attached to a Letter of Referral (LOR). This letter should describe the reasons for referral and request that OI be notified of the decision of whether or not to pursue the matter. The Commission has authorized the Director, OI to refer these cases to the appropriate authority. The OI Field Office Director will recommend referral and forward the draft LOR with the ROI to OI Headquarters. OI:HQ will then provide a copy of the proposed referral to OGC for consultation. Although the Director, OI is free to refer a matter regardless of the comments provided by OGC during this consulation process, it is OI policy to accommodate OGC comments and recommendations as much as possible. OI Headquarters will then issue the LOR under the Director's signature.

Referrals involving material false statements are also sent to the Commission for consultation. This is normally done subsequent to the OGC consultation, but in some instances these actions may take place concurrently. This consultation period normally takes five working days. At the end of that period, the Director, OI may refer the matter in the usual manner. OI is required to enclose any Commissioner's (s') views resulting from this consultation process to the referral letter transmitting the matter to the Department of Justice.

8.2.2.2. Degree of Investigation. When an OI investigation involves a suspected violation of a criminal statute in addition to a breach of an NRC regulatory requirement, the investigator will conduct the OI investigation until all essential leads have been developed sufficiently to ensure that the NRC can make an informed decision. The agency to which the matter has been referred has the discretion and responsibility to perfect a case for prosecutorial purposes. OI may, on occasion and upon request, assist in such endeavors from an investigative and technical coordination standpoint. The extent of assistance will depend on available resources and must be approved in each case by the Director, OI.

8.2.3. Release of the ROI "Synopsis" to the Public Document Room (PDR). OI Field Office Directors may [will] authorize Regional Administrators to release [only] the "Synopsis" sections of Reports of Investigation to the PDR. Upon approval by the OI Field Office Director, the Regional Administrator will ensure that such synopses are placed in the PDR. Proprietary reviews, etc., are the responsibility of the cognizant Regional Administrator. The OI Field Office Director will document activities involving PDR releases in the appropriate case files.

8.3. Forwarding Investigation Information to Other Law Enforcement Agencies

Aside from the formal referral of suspected criminal wrongdoing to Federal, state, or local prosecutors, OI investigations may develop information which clearly involves matters within the jurisdiction of Federal, state, or local law enforcement/investigative agencies. Investigative Policy 14 directs OI to provide that information to the agency concerned under appropriate controls. (see Chapter 7 regarding disclosure of confidential sources under such circumstances.)

8.3.1. Information Currently Under Investigation by OI. When a matter under active investigation by OI is also potentially within the jurisdiction of another agency, OI will notify that agency through the formal referral process at the completion of the OI investigation.

In instances where a delay in notifying the agency has the potential for prejudicing the other agency's subsequent investigation, the Director, OI, may approve notification prior to completion of the OI investigation. In emergency circumstances, OI Field Office Directors may authorize immediate notification with expeditious follow-up notification to OI Headquarters.

OI investigations which disclose evidence of sabotage, espionage, theft of nuclear material or terroristic activities always require prompt notification of the Federal Bureau of Investigation (FBI). Similarly, OI will promptly notify the appropriate agency if there is a likelihood that a delay could result in the loss or destruction of evidence. Lastly, prompt notification is mandatory if OI obtains information that a crime within the jurisdiction of another agency is about to occur or is occurring under circumstances where timely intervention by that agency could result in immediate arrests and/or seizure of evidence.

8.3.2. Information Pertaining to Matters Not Under Investigation by OI. If OI develops information regarding violations clearly outside the jurisdiction of NRC, such as tax fraud, counterfeiting, homicide, racketeering, larceny of other than nuclear safety-related items, and similar matters, the OI Field Office Director should document the information in a memorandum for file and provide a copy of that memorandum to the appropriate Federal, state, or local agency. The OI Field Office Director should forward the memorandum with a transmittal letter that specifies the purpose of providing the memorandum and sets forth any apparent restrictions on its use, such as impact of public disclosure on NRC activities, conditions requested by the source of information, or confidentiality issues, if any. If the information is in the form of a statement or transcript, it may be forwarded in lieu of the aforementioned memorandum for the file. On the other hand, it is not appropriate to furnish the other agency information pertaining to NRC matters that is not relevant to their needs. Thus, non-relevant material should be removed, or conversely, the relevant material extracted, prior to furnishing it to the non-NRC agency.

If the issue involves apparent concurrent violations of law and NRC requirements, OI will refer the matter to the appropriate field component of the Federal agency having primary jurisdictional interest over the offense (i.e., FBI DEA, Secret Service, etc.). In instances where there may be more than one interested Federal agency, OI will provide the information to the appropriate United States Attorney. Where the second agency initiates activity during the pendency of an OI investigation, the OI investigation will continue, unless the other agency requests otherwise. OI Headquarters must approve any delay or termination of an OI investigation.

8.3.3. Confidential Sources. Release of the identity of confidential sources to other agencies will be governed by the provisions of Chapter 7 of this manual.

8.4. Notifications to Licensees, Applicants and Their Contractors and Vendors of the Initiation, Conduct, or Termination of an Investigation or Inquiry

The notification of managers of the licensee or applicant and their contractors and vendors of an OI investigation or inquiry is a sensitive step in the investigative process, and requires discreet behavior by the investigator during the course of his/her activities. OI may notify responsible management officials of the arrival of an OI investigator onsite. However, OI will not normally inform the licensee or applicant of the specific matters being investigated. This does not preclude discussion of the methodology for conducting the investigation, such as interview scheduling, space.

If appropriate, OI may notify the licensee or applicant and their contractors and vendors when the investigator has completed his onsite activities. OI will not discuss the results of the investigation or inquiry with them at this time. Information concerning safety or security issues requiring immediate attention will be handled in accordance with Paragraph 8.1., above.

8.5. Contacts With the Media

OI policy requires that all field contacts between the news media and employees of OI be through the Office of Public Affairs (PA). Any OI employee contacted by a media representative should courteously refer that person to the appropriate representative of PA. Public Affairs personnel are responsible for responding to media inquiries within the guidelines set forth in this section.

8.5.1. Open Investigations. OI will make no public comment regarding ongoing investigations. Public Affairs officers may acknowledge that OI is in fact conducting an investigation, after obtaining approval from OI. However, OI will not release details regarding that investigation, such as the specific nature of the investigation, the number of personnel assigned, or estimates as to its duration.

8.5.2. Other Matters. PA will refer media inquiries regarding other matters including closed investigations, general discussions of investigative procedures, or any general discussions of the functions of OI to the Director, OI. The Director will then decide (1) whether to respond to the media inquiry, and (2) the identity of the OI employee authorized to respond to the inquiry.

From time to time media representatives will attempt to contact OI employees directly. Although the above guidelines will certainly apply, it is also OI policy to deal courteously and honestly with such representatives. Under no circumstances will an OI employee provide false or misleading information to the media. An OI employee should courteously but firmly refer the representative to the Office of Public Affairs.

8.5.3. Obtaining Information From the Media. The foregoing restrictions pertain to attempts by media representatives to obtain information from OI. However, there may be occasions where media representatives are believed to possess information of interest to OI.

8.5.3.1. Information Volunteered by Media Representatives. Occasionally, members of the media will contact OI to volunteer information regarding a matter potentially within the jurisdiction of the NRC. OI employees should receive this information in the same manner as they would any other information. OI employees should inform the media representatives that the information will be evaluated by appropriate agency officials to determine the proper course of action. OI employees must be careful not to commit to any specific NRC response to the information, and should inform the representative of OI's policy regarding media contacts.

8.5.3.2. OI-Initiated Contacts. Occasionally, OI employees may identify a need to contact a media representative to obtain information such as leads or names of informants. Typically, this need will arise when a news article or broadcast portrays general allegations regarding an NRC-licensed facility or activity and OI requires greater specificity in order to make an investigative decision. Except in emergency conditions, OI employees will not make such contacts without the approval of OI Headquarters. Headquarters-approved contacts normally will involve the assistance of an appropriate Public Affairs officer. The Public Affairs officer should know of the impending contact and assist in arranging for the interview. Investigators must be especially careful to comply with OI guidelines regarding release of information during the course of such interviews. If the media representative is reluctant to provide information, the investigator should discontinue the contact and consult his or her supervisor for advice. Under no circumstances will an OI investigator attempt to threaten or cajole a media representative who is otherwise unwilling to provide requested information. Likewise, the investigator should never discuss subpoenas under such circumstances.

8.6. Obtaining Information From the U.S. Postal Service

Usually an OI investigator may obtain a forwarding address of a person or an actual street address of a particular individual who possesses a post office box number by displaying NRC credentials and explaining the purpose. Some U.S. Postal employees will also require a letter, certifying that the investigator requires this postal information in the performance of official duties. In such situations, a letter similar to the following should be provided:

> The undersigned certifies that ______________________ is an Investigator with the Office of Investigations, U.S. Nuclear Regulatory Commission. Pursuant to 39 CFR 265.6 (Release of Information--Availability of Records), please provide to the above-named investigator, without charge, the forwarding addresses or forwarding post office box numbers of the individuals or organizations listed below:
>
> In the event the forwarding address is a post office box number, please provide also the actual street address of the individual or organization, if known. Such information is required to be obtained in the performance of the Investigator's official duties with the U.S. Nuclear Regulatory Commission.
>
> Director, ___________ Field Office
> Office of Investigations
> U.S. Nuclear Regulatory Commission

Form NRC-489
(1-76)

U. S. NUCLEAR REGULATORY COMMISSION
NRC MANUAL
TRANSMITTAL NOTICE

CHAPTER NRC-0517 MANAGEMENT OF ALLEGATIONS

SUPERSEDED:			**TRANSMITTED:**		
	Number	Date		Number	Date
			TN	0500-20	
Chapter			Chapter	NRC-0517	6/20/87
Page			Page		
Appendix			Appendix	NRC-0517	6/20/87

REMARKS:

This new chapter and appendix define the policy and procedures for the proper receipt, processing, control, and disposition of allegations, received for resolution by NRC Offices, that concern NRC-regulated activities; policy and procedures for dealing with individuals who provide information to NRC; and policy and procedures for the referral of matters to the Office of Investigations. This chapter does not apply to allegations of wrongdoing on the part of NRC employees or contractors.

U.S. NUCLEAR REGULATORY COMMISSION
NRC MANUAL

Volume: 0000 General Administration
Part : 0500 Health and Safety NRR

CHAPTER 0517 MANAGEMENT OF ALLEGATIONS

0517-01 COVERAGE

This chapter and its appendix define the policy and procedures for the proper receipt, processing, control, and disposition of allegations, received for resolution by NRC offices, that concern NRC-regulated activities. This chapter also includes the policy and procedures for dealing with individuals who provide information to the NRC including protecting the identity of persons providing information in confidence, and the policy and procedures for the referral of matters to the Office of Investigations (OI).

0517-02 OBJECTIVES

021 To establish the policy for the receipt, processing, control, and disposition of allegations and to define procedures by which the receipt, status, and disposition of allegations are tracked through the Allegation Management System (AMS), thereby assuring that:

a. allegations are properly assigned for processing and assessed for safety significance to permit ranking and resolution in a timely manner.

b. timely and accurate information on all allegations is maintained and made available to NRC Offices and Regions on a need-to-know basis.

c. all allegations not resolved by other formal means are processed in accordance with these procedures and the resolution of all allegations is properly documented.

022 To assure that individuals making allegations to the NRC are properly treated, their identity protected where appropriate and possible, and that they are notified of the resolution of their concern.

023 To assure that issues raised are promptly and adequately investigated.

024 To establish the policy for requesting and setting priorities for investigations of matters which involve potential wrongdoing and to define the procedures for referral of such matters to OI.

0517-03 RESPONSIBILITIES AND AUTHORITIES

031 The Commission:

a. approves the revocation of confidentiality agreements in appropriate cases.

b. approves the release of the identity of a confidential source to another governmental agency when the source cannot be reached or when the source objects to the release of his/her identity.

c. provides guidance regarding the initiation of investigations into the character or suitability of entities within the jurisdiction of the NRC, or the employees of such entities, in those instances where the character or suitability aspects of the matter being considered for investigation are unrelated to a violation of NRC regulatory requirements.

d. resolves differences over the need for and prioritization of investigations as referred from the EDO.

032 The Executive Director for Operations (EDO):

a. establishes policy and procedures for the receipt, processing, control, and disposition of allegations.

b. in conjunction with the Director, OI, implements the policy for initiation, establishment of priorities and termination of investigations.

c. requests investigations of matters involving potential wrongdoing identified by the Headquarters staff.

d. in conjunction with the Directors of the Office of Investigations and the Office of Inspector and Auditor (OIA), implements policy for protecting the confidentiality of those who provide information to the NRC pursuant to a confidentiality agreement.

e. for those matters within the purview of OI and OIA, establishes policy and procedures governing their interfaces with other Offices and Regions.

f. approves revocation of confidentiality as requested by the Director of the Office or Regional Administrator that originally granted confidentiality pursuant to a delegation of authority from the EDO.

g. resolves differences on the need for and prioritization of investigations requested of OI by Offices and Regions, or refers these differences to the Commission.

033 Directors of Offices and Regional Administrators:

a. establish internal procedures so that all employees are aware of requirements for receipt, processing, control, and disposition of allegations and for the accurate and timely updating of the status of those allegations for which their office is the Action Office.

b. resolve those allegations for which the Office or Region is the Action Office.

c. appoint an Office Allegation Coordinator (OAC)* who serves as administrative point of contact for the Office or Region on allegations, and who is responsible for relieving line management of the direct administrative burden associated with handling allegations. Line management remains responsible for decisions regarding the safety review and referral of wrongdoing issues to OI. The OAC will:

   (1) ensure that the appropriate parts of the Allegation Data Form (NRC Form 307, Exhibit 1) are completed for all allegations received within the Office or Region and that the data are accurate and timely.

   (2) determine the appropriate Action Office and, if applicable, coordinate with the OAC of the affected Office or Region on each allegation received.

   (3) forward the Allegation Data Form to the respective Action Office OAC when the receiving Office or Region is not the Action Office.

   (4) when the receiving Office or Region is the Action Office, ensure that the allegation is entered into the AMS within 10 working days of receipt. (For power reactors, during the period from 30 days prior to the construction completion date until the Commission meeting on full-power authorization, the Receiving Office or Action Office for any allegation will, within 2 working days, telephonically notify the NRR Project Manager of its receipt and the identification of the Action Office in addition to entering the allegation into the AMS.)

   (5) ensure that allegations assigned to the Office or Region are entered into the AMS within 10 workdays of receipt.

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*All Regions and the Offices of NRR, NMSS, RES, OSP and AEOD are required to appoint OACs. Other offices may appoint OACs if they believe their mission and the potential for serving as an Action Office require it. Offices not appointing OACs shall refer any alleger or allegation received to the OAC for NRR, which shall then be responsible for the actions of the Receiving Office as set out in this chapter and appendix.

(6) acquire input data on new allegations (including those referred to OI) from the staff within the Office or Region and ensure this information is entered in the AMS).

(7) ensure that all open allegations in the AMS are reviewed and updated as necessary on a monthly basis.

(8) ensure the preparation of reports as described in Appendix 0517, Part I, I.4.

(9) maintain records of all allegations for which the Office or Region is the Action Office.

(10) maintain secure files when such files contain information which would reveal the identity of a confidential source.

d. determine the safety significance and generic implications of those allegations that fall within the programmatic responsibility of that Office or Region and establish schedules for the processing of allegations with the objective of resolving them as promptly as resources allow and prior to any applicable licensing decision date.

e. review those allegations for which it is the Action Office for potential board notification and recommend such notification to NRR or NMSS.

f. refer all matters where there is a reasonable basis for belief of wrongdoing and for which the staff determines an investigation is necessary to determine whether regulatory action is required, except those involving NRC employees or NRC contractors, to the Office of Investigations in accordance with the guidance herein and in Appendix 0517, Part III, and provide technical assistance to OI for investigating allegations as requested.

g. refer all allegations of wrongdoing by NRC employees or NRC contractors to the Office of Inspector and Auditor. Such allegations are not to be entered in the AMS. However, records should be maintained to show that the allegation has been referred to OIA. (See Chapter NRC 0702.)

h. prior to taking a major action such as a licensing decision or escalated enforcement, review the status and resolution of allegations for that project in the AMS especially those related to the action.

i. ensure that technical concerns with generic safety implications have been reviewed by the cognizant technical staff and considered for dissemination to other affected Offices and Regions for information and/or action as required.

j. ensure that allegations received that are potential violations of Section 210(a) of the Energy Reorganization Act are entered in the AMS and processed in accordance with the provisions of NRC Appendix 0517, Part I., C.4.

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k. ensure that the Commission's Policy Statement on Confidentiality is implemented and that all NRC personnel take all necessary steps to protect the identity of confidential sources.

l. resolve those matters within area of responsibility initially referred to OI but which are returned by OI without conducting an investigation because of its resource constraints.

034 The Director, Office of Investigations:

a. investigates allegations of wrongdoing by other than NRC employees and NRC contractors as requested by the Commission, on own initiative or as referred to OI by the staff in accordance with the policy and procedures set forth in Appendix 0517, Part III. Conducts interface responsibilities with the Offices and Regions as described herein.

b. implements, in conjunction with the Executive Director for Operations and the Director, Office of Inspector and Auditor, policy for protecting the confidentiality of those who provide information to the NRC pursuant to a confidentiality agreement.

c. implements, in conjunction with the Executive Director for Operations, policy for initiation, establishment of priorities and termination of investigations set forth in Appendix 0517, Part III.

d. approves the revocation of confidentiality in appropriate cases where OI originally granted the confidentiality.

035 The Director, Office of Inspector and Auditor:

a. implements, in conjunction with the Executive Director for Operations and the Director, Office of Investigations, policy for protecting the confidentiality of those who provide information to the NRC pursuant to a confidentiality agreement.

b. investigates allegations of wrongdoing by NRC employees and NRC contractors. Such allegations do not fall under the purview of this manual chapter and are not entered in the AMS.

c. approves the revocation of confidentiality in appropriate cases where OIA originally granted the confidentiality.

036 The Director, Office of Enforcement:

a. monitors the investigations being conducted within the OE area of responsibility to assure that an investigative priority or schedule requested by a Regional Administrator and established by the Director, Office of Investigations, meets regulatory needs.

b. monitors activities conducted by the Department of Labor under Section 210 of the Energy Reorganization Act.

037 The Director, Office of Nuclear Reactor Regulation:

a. proposes to the EDO for approval agency-wide policy and procedures regarding the processing of allegations. For those allegations that fall under the purview of OI, proposes policy and procedures governing their interface with other Offices and Regions.

b. reviews allegations concerning NRR licensees in coordination with the Action Office for potential board notification and makes such notification, if required.

c. evaluates implications of allegations relative to licensing decisions and plant safety concerning NRR licensees in coordination with the Region(s).

d. manages the AMS and authorizes and requests system improvements from IRM.

e. conducts programmatic reviews of all action offices to assure implementation of NRC policy on allegations.

f. monitors the investigations being conducted within the NRR area of responsibility to assure that an investigative priority or schedule requested by a Regional Administrator and established by the Director, Office of Investigations, meets regulatory needs.

g. prepares and publishes a list of NRC Office Allegation Coordinators (OAC) at least once every 12 months.

h. monitors the allocation of resources for allegation management by the Regions.

038 The Director, Office of Nuclear Material Safety and Safeguards:

a. reviews allegations concerning NMSS licensees in coordination with the Action Office for potential board notification and makes such notification if required.

b. evaluates implications of allegations relative to licensing decisions concerning NMSS licensees in coordination with the Region(s).

c. monitors the investigations being conducted within area of responsibility to assure that an investigative priority or schedule requested by a Regional Administrator and established by the Director. Office of Investigations, meets regulatory needs.

039 The Director, Office of Special Projects:

a. reviews allegations concerning OSP licensees for potential board notification and makes such board notification, if required.

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b. evaluates the implications of allegations relative to licensing decisions and plant safety concerning OSP licensees.

c. monitors the investigations being conducted within the OSP area of responsibility to assure that an investigative priority or schedule requested by OSP and established by the Director, Office of Investigations, meets regulatory needs.

0310 The Director, Office of Administration and Resources Management (ARM):

a. provides ADP support to maintain the AMS.

b. provides special reports to AMS users as requested and authorized by NRR.

c. provides ADP assistance to the NRR Program Manager for Allegations in making modifications and improvements to the AMS.

0311 Office of the General Counsel (OGC) and Regional Counsels:

a. provide legal counsel in resolving allegations as necessary.

b. review the legal basis for referrals of matters to the Office of Investigations as requested.

c. provide legal counsel on confidentiality agreements as requested.

0517-04 DEFINITIONS

041 Action Office. The NRC Program Office or Region that is responsible for reviewing and taking action, as appropriate, to resolve an allegation. For the purposes of this chapter, OI and OIA are not considered Action Offices.

042 Action Officer. The staff member in the Action Office who is assigned the responsibility for resolving an allegation.

043 Allegation. A declaration, statement, or assertion of impropriety or inadequacy associated with NRC-regulated activities, the validity of which has not been established. This includes all concerns identified by sources such as the media, individuals or organizations, and technical audit efforts from the Federal, State or local government offices regarding activities at a licensee's site. Excluded from this definition are matters being handled by more formal processes such as 10 CFR 2.206 petitions, hearing boards, appeal boards, etc. Allegations that may result from these formal processes and are not resolved within these processes shall be subject to treatment under this chapter. Allegations in 2.206 petitions alleging misconduct by NRC employees or NRC Contractors will be promptly referred to OIA by management. (See Appendix 0517, Part I.D.)

044 Allegation Management System (AMS). A computerized information system that contains a summary of significant data pertinent to each allegation.

045 Alleger. An individual or organization who makes allegations. The individual or organization may be a concerned private citizen, a public interest group, news media, a licensee, vendor or contractor employee, or a representative of a local, State, or Federal agency.

046 Confidentiality. The term that refers to the protection of data that directly, or otherwise, could identify a confidential source by name.

047 Confidential Source. A person who provides information to the NRC pursuant to a Confidentiality Agreement. (Exhibit 2).

048 Inspection. For purposes of this chapter, a special investigatory activity normally conducted by EDO Offices and Regions that may be used to evaluate and resolve an allegation.

049 Investigation. For the purposes of this chapter, an activity normally conducted by the Office of Investigations that may be used to evaluate and resolve an allegation.

0410 Office Allegation Coordinator (OAC). A designated staff member in an Office or Region who serves as the point of contact for that Office or Region regarding the processing of allegations.

0411 Protected Activities. Employees of licensees and contractors are engaged in protected activities within the meaning of Section 210 of the Energy Reorganization Act and the Commission's regulations, e.g., 50.7, when they are raising potential safety concerns to their management as well as when they raise such concerns to the NRC.

0412 Receiving Office. The Office or Region that initially receives an allegation. In some cases, the Action Office and Receiving Office will be the same if the allegation falls within the functional responsibility of the Receiving Office.

0413 Sanitize. The process of ensuring that any NRC document developed as a result of an allegation does not reveal the identity of the alleger.

0414 Secure Files. Files which are locked when not in use and to which access is controlled on a need-to-know basis.

0415 Wrongdoing. Wrongdoing consists of both intentional violations of regulatory requirements and violations resulting from careless disregard of or reckless indifference to regulatory requirements. A reasonable basis for belief of wrongdoing exists when, from the circumstances surrounding it, a violation of a regulatory requirement appears more likely to have been intentional or to have resulted from careless disregard or reckless indifference than from error or oversight.

0517-05 BASIC REQUIREMENTS

051 Applicability. The provisions of this chapter and appendix are applicable to, and shall be followed by, all NRC employees.

052 Wrongdoing. Those matters where there is a reasonable basis for belief of wrongdoing, and for which the staff concludes an investigation is necessary to determine whether enforcement or other regulatory action is required, should be referred to the Office of Investigations following the procedures set forth in Appendix 0517, Part III. Allegations of wrongdoing by NRC employees or NRC contractors fall within the purview of OIA and are not entered into the AMS. OI will notify the requester within 30 days whether the matter has been accepted for investigation and, if so, the priority of the investigation and the estimated schedule. If a request is not accepted, OI will provide the requester with the basis for its decision. Any differences between the staff and OI on the need for or priority of an investigation shall be resolved in accordance with the process described in Appendix 0517, Part III. The Office or Region will enter allegations of wrongdoing into the AMS using information received from the alleger or provided by OI (see Appendix 0517, Part I, I.2). OI will provide either a report or a summary of its findings of those matters which it investigates to the requesting Office or Region. Allegations involving wrongdoing for which a Region is the Action Office will be coordinated by the Region OAC with the OI Field Office Director in that Region. Allegations involving wrongdoing for which a Headquarters Office is the Action Office will be coordinated with OI Headquarters. (See also Appendix 0517, Part I.D.)

053 Action Office Assignments. Allegations submitted by any source concerning NRC-regulated activities should be transmitted by the Receiving Office OAC to the OAC in the appropriate Office or Region for processing.

054 Identity of Allegers. As a general rule, the need-to-know principle should be implemented for all allegers. Generally, this means avoidance of unnecessary use of the identity of the alleger and other identifying information in discussions and in documents. With the exception of reports prepared by the Office of Investigations, reports should normally not contain information which would reveal the identity of an alleger. Individuals using documents containing information which could reveal the identity of an alleger are responsible for controlling such documents, such as by placing them in locked storage when not under the individual's personal control. If asked whether a person is an alleger, NRC staff should respond that it is NRC policy to neither confirm nor deny the existence of an individual alleger. This policy was developed in conjunction with the Department of Justice. The FIPAB Branch, ARM, should be contacted should specific questions arise in this area.

Higher standards of control are to apply when an alleger has been granted confidential source status. Confidential source status is granted when a Confidentiality Agreement (Exhibit 2) is executed by the NRC and the alleger. Guidance with respect to granting confidentiality, revoking confidentiality, and providing the identity of a confidential source outside the NRC is contained in Appendix 0517, Part II.

The identity of a confidential source must be protected by not referring to the name or other identifying information in internal NRC discussions unless absolutely necessary, and by expurgating the name and other identifying information from allegation documents before providing them to authorized/assigned NRC staff members. Allegation files and documents which contain information which could reveal the identity of a confidential source are to be marked "Contains information which would reveal the identity of a confidential source," and may not be reproduced without the authorization of the OAC. Information which can reveal the identity of a confidential source shall not be released in response to Freedom of Information Act requests. The authority to withhold such information from public disclosure is contained in 10 CFR § 9.5(a)(7)(iv). Information which could reveal the identity of an alleger who has not been granted confidential source status may also be withheld under appropriate circumstances, but this may not always be the case. OGC or Regional Counsel should be consulted in any questionable cases.

055 Secure Files. All information relating to cases where confidentiality has been formally granted, by signed agreement, must be kept in a secure file cabinet or safe to which limited access is permitted. The OAC is responsible for (a) restricting access to authorized NRC personnel, (b) verifying the "need to know" of the individuals requesting access, (c) ensuring that no unauthorized reproduction (photocopying or other copy) of the information is made - multiple copies made for simultaneous review must be returned to the file, and (d) ensuring by an informal briefing of the requestor, that information is kept in a secure location while outside of the central file and is returned in a timely manner.

056 Staff Generated Information. Staff generated information relating to evaluations or inspections of allegations where confidentiality has been formally granted must be sanitized such that no information is included that reasonably could, through any path, lead to the identification of the alleger, or, such staff generated information must be kept in the secure files. The OAC should provide instructions to NRC staff personnel who generate and review such information concerning sanitization of documents and all unsanitized documents generated must be clearly marked to indicate their sensitivity. Drafts of staff generated information for such cases should be destroyed upon finalization of the associated document.

057 Responding to Allegers. When allegations are received in writing, a prompt attempt to make personal contact must ordinarily be made in each case either by a letter, telephone call or personal meeting. Contact should be earnest and professional. The alleger should be promptly advised of the results of followup action and, in instances of unusual delay in providing the results, should be advised of the status periodically so that there is an awareness that the allegation is being pursued.

058 Processing Allegations. The Action Office should resolve all allegations in a manner which is timely under the circumstances (taking into consideration the schedule and/or stage of licensing and the complexity of the issue raised).

Except as discussed below (Handling of Late Allegations), all allegations received prior to issuance of an initial license should be adequately addressed and, if possible, resolved before the license is issued. Allegations having relatively high safety significance should be addressed first and with expedition. Less significant allegations should be addressed as priorities and resources permit, but usually within 6 months of receipt.

Allegations should be screened as promptly as possible to assure the proper identification of their significance. As a result of screening, it may be possible to close out some allegations early in the process for logical reasons (e.g., after initial inquiry, the allegation is frivolous or too vague or general in nature to permit further followup). It should be noted that there is no threshold for the acceptance of allegations. All allegations will be accepted and entered in the AMS. Obviously, some allegations will require more time and effort to resolve than others. The type and amount of effort required to bring an allegation to closure is a decision to be made by the Action Office on a case-by-case basis. However, even vague, general or hearsay allegations require a reasonable effort on the part of the staff to support a determination to close an allegation. Appropriate documentation of such determination shall be provided. In any event, while the safety significance of an allegation is important in determining the extent and promptness of staff resource commitments, it should not affect the treatment of the alleger as discussed in paragraph 057, above.

Followup of allegations should focus not only on the particular allegation but on the overall area of concern, including the potential for generic implications as well as wrongdoing. In this regard, note that an allegation directed toward a non-safety item or activity may, as a result of generic implications, affect a safety item or activity. When a number of allegations point to or reinforce indications of a broader problem, prompt action to broaden the scope of the inquiry should be taken to determine the extent of the problem.

If it is appropriate, an inspection should be made. A plant visit with the person making the allegation may be made if necessary and if the individual is willing to make such a visit to find the exact location of a problem. Access issues should be addressed on a case-by-case basis. Travel costs for the individual only can be offered, if necessary, and are borne by the Office or Region extending the offer. Care should be taken to avoid embarrassment or abuse of the individual, e.g., schedule visit on off-shift/weekend, etc.

Allegations which are potential violations of Section 210(a) of the Energy Reorganization Act are to be processed in accordance with the provisions of NRC Appendix 0517, Part I., C.,4.

059 Handling of Late Allegations. Ideally, all allegations concerning a particular facility will be resolved before any license is authorized. If, however, because of the number of allegations and/or their tardy submission all allegations cannot be resolved in a timeframe consistent with reasonable and responsible licensing action, it may be necessary to give priority to those allegations which, because of their potential impact on safety, must be resolved before licensing action can be taken. In this regard, Action Offices must be alert to the possibility that late allegations may impact on upcoming licensing decisions. Therefore, close coordination and consultation between Action

Offices and the appropriate licensing office is required in carrying out the responsibilities and procedures for processing late allegations set out in this chapter.

In reviewing late allegations, the Action Office will first determine whether, if true, the allegations are material to the licensing decision in that they would require denial of the license sought, the imposition of additional conditions on such license, or further analysis or investigation. If it appears that the allegations may be material to a licensing decision, the Action Office will promptly consult with the appropriate licensing office that will make a final determination on materiality and assist the Action Office in determining further appropriate action. The Action Office also has responsibility to recommend Board Notification to the licensing office, if warranted. Allegations which, even if true, are not material to any licensing decision or which on their face or after initial inquiry are determined to be frivolous or too vague or general in nature to provide sufficient information for the staff to investigate will receive no further consideration and may be closed out on this basis.

As to allegations which are material to the licensing decision, the Action Office will next determine whether the information presented is new in the sense of raising a matter not previously considered or tending to corroborate previously received but not yet resolved allegations. In making this determination all information available to the NRC will be considered, including that previously provided by an applicant or licensee and that obtained by the Agency in the course of its review and inspection efforts or from its investigation of prior allegations. In some cases, information already available to the NRC may be sufficient to resolve certain allegations. However, if an allegation is found to be both material and new, the staff will evaluate the allegation further.

If the Action Office determines that, as a result of the number of allegations or the timeframe in which they are received it appears likely that full consideration of all allegations cannot be accomplished consistent with reasonable and timely Commission licensing action, the Action Office will conduct a further screening of the allegations to determine their significance to safety and therefore what priority should be assigned relative to the activity to be authorized. The following screening criteria will be considered:

a. The likelihood that the allegation is correct, taking into consideration all available information including the apparent level of knowledge, expertise, and reliability of the individual submitting the allegation in terms of the allegation submitted and the possible existence of more credible contrary information.

b. The need for prompt consideration of the allegation recognizing the public interest in avoiding undue delay. If the staff determines that an allegation raises a significant safety concern (i.e., an allegation that would, if true, (1) raise a significant question about the ability of a particular structure, system or component to perform its intended safety function, or (2) raise a significant question of management competence, integrity or conduct, or about implementation of a quality assurance program sufficient to raise a legitimate doubt as to the ability of the licensee to operate the plant safely) which brings into question the safe operation of the facility at a given stage of operation, the allegation must be addressed prior to authorizing that stage. Allegations which are less significant will be resolved in the normal course of business independent of license issuance.

Note that the screening called for by this section is to be conducted to determine which late allegations must, because of their safety significance, be resolved before issuance of a license; the initial screening called for by paragraph 058 above, on the other hand, is intended to facilitate the allocation of staff resources based on safety significance irrespective of license issuance and is necessary in all cases.

0510 Involvement of Licensees or Other Affected Organizations. For allegations involving a potentially significant and immediate impact on the public health and safety, the affected organization should be promptly informed to assure proper and timely action. For other allegations, once information from allegers is received and understood by the Office/Region, the licensee/vendor should be advised specifically by letter of the area of concern and should be requested to address it, subject to further audit by NRC to ensure that the licensee response is adequate, in order to minimize the expenditure of NRC resources. Before referring an allegation to an applicant, licensee or vendor, an effort should be made to contact the alleger and advise him/her of the planned referral. The alleger should be informed that the NRC will review and evaluate the licensee's activities and response as necessary and will inform the alleger of the final disposition. The affected outside organization should be informed regarding the resolution of the allegation, if appropriate. (See Appendix 0517, Part I, H.)

In all instances, the identity of an alleger should not be revealed unless it is clear the alleger has no objections. Also, the effectiveness of investigations/inspections should not be compromised. These exceptions are discussed further below.

While action offices are expected to refer as many allegations as possible and appropriate to licensees, applicants and vendors for action and response, there are two major exceptions to the involvement of the licensee or vendor in the resolution process. The first exception is where the information cannot be released in sufficient detail to be of use to the licensee or vendor without compromising the identity of an alleger. In such cases release should not normally be made. The EDO shall normally be consulted in all cases where it appears there is a need to release the identity of a confidential source and the appropriate Regional Administrator or Office Director shall normally be consulted if the identity of a non-confidential source may be compromised.

The second exception is where a licensee/vendor could compromise an investigation or inspection because of knowledge gained from the release of information. In the case of an inspection, the decision to release information to the licensee shall be made by the Director of the Action Office. When information cannot be released without risk of compromising an investigation, the Director of the Action Office shall inform the Director, OI, in advance that information related to an open investigation is being considered for release to the licensee because safety or security concerns require initiation of immediate corrective actions before publication of the investigation report. The Director, OI, will review the information to be released and advise the Director of the Action Office of the anticipated effect of its release on the course of the investigation. The Director of the Action Office will release the information only after determining that the safety or security concerns are significant enough to justify the risk of compromising the effectiveness of the pending investigation and, possibly, subsequent enforcement or prosecution options. Any such release of information should be recorded in the investigation report.

In the event of an emergency, or a significant safety or security issue which may be identified from an allegation and which appears to require immediate action, NRC employees, at their discretion, may discuss with, show to, or provide the licensee any pertinent material they believe the circumstances warrant. If time permits, the employee should first consult with his management.

An emergency situation is one in which, in the opinion of the senior NRC employee knowing of the situation, a present danger to public health or safety or to the common defense requires the release of investigative information or information which could reveal the identity of an alleger to a licensee without the delay necessary to consult with appropriate NRC personnel. Examples of such types of emergency situations are those that involve a potential radiation overexposure to personnel or a potential release of radioactivity to the environment. For example, if an NRC employee knew, through an investigation or from an alleger, that falsified calculations were used to determine the radioactivity of the contents of a tank and there was a clear potential for the release of the contents to the environment, the NRC employee should stop the release immediately, even though such action might reveal the existence of an investigation or the identity of an alleger.

Likewise, if an NRC employee who solely because of information gained from an investigation or an alleger was in a position to prevent a radiation overexposure to someone, the NRC employee should intervene even though the intervention might compromise the investigation or reveal the identity of an alleger.

As soon as practical after a release of investigations information or information which could reveal the identity of an alleger in such an emergency situation, management, the EDO and OI shall be informed of the details regarding the information disclosure.*

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*As a general rule, the fact that a particular matter has been or will be referred to the Department of Justice (DOJ) should never be disclosed to the licensee. A reply of "I cannot comment on that matter" is appropriate in most cases. However, if a Regional Administrator or Office Director feels he or she must disclose that a referral has been or will be made to the Department of Justice, such disclosure will be made only with the prior concurrence of the Director, OI.

As previously stated, generally there should be no need to link the fact that an investigation is under way when providing information to licensees pertaining to potential safety concerns or to obtain correction of a specific technical issue. However, when for the reasons stated above, the Director of the Action Office decides after consultation with OI to delay informing a licensee of an issue, this decision and the basis on which the delay is found to be consistent with public health and safety should be documented by the Director of the Action Office and the decision reexamined every three months to assure its continuing validity.

In determining whether to refer allegations to a licensee, consideration should also be given to:

a. The licensee's past record in dealing with allegations, that is, the likelihood that the licensee will effectively identify, investigate, document and resolve the allegation.

b. The possibility that the release of information could bring harm to the alleger.

c. Whether the allegation is made against the licensee, applicant or vendor management or those parties who would normally receive and address the allegation.

d. Whether the alleger has voiced objections over the release of the allegation to the licensee, applicant or vendor.

e. Whether the allegation is based on intelligence from another governmental agency, which does not approve of the information being released in a referral.

f. Whether the alleger has already taken this concern to the licensee with unsatisfactory results.

Most allegations sent to the licensee for resolution will require a positive response from the licensee concerning their resolution or position on the concern. If the staff agrees with the licensee's response, it can be incorporated into the staff's close-out letter to the alleger. Obviously, if staff does not agree with the licensee's position, the allegation remains an open issue.

For example, an allegation that a welder working on a non-safety-related system was not properly certified may be referred to a licensee. However, a licensee response is necessary to determine, if the allegation is substantiated, whether the individual worked on other systems of interest to the staff, whether other individuals were similarly not properly trained/certified, and whether the licensee's methods were adequate to assure that the work performed by this or other similarly trained individuals on safety-related systems, if any, was done properly.

Further, an allegation that hangers or support devices for balance-of-plant systems were improperly installed may also be referred to the licensee. A response would be required to determine, for instance, (1) if the individual who installed the hangers worked on any safety-related systems, (2) if so, was the individual properly certified, and (3) if the individual was not properly certified and worked on safety-related systems, what measures have been taken to assure that the work was done correctly.

There are some allegations which can be turned over to a licensee without requiring a response. Allegations concerning such matters as workers' access to the Administration Building, allocation of preferred parking spaces, dusty conditions at the site and similar issues may be turned over to the licensee or OSHA or other appropriate authority without specific NRC followup. The alleger must be so informed.

Note that 10 CFR 19.16(a), involving radiological working conditions, requires that a worker's request for inspection be in writing and be made available to the licensee no later than at the time of inspection, and that confidentiality be provided at the worker's request. In addition to expurgating names and other identifying information, protection of confidentiality could also involve retyping an alleger's handwritten notice. In the event the potential for wrongdoing is involved, the matter should be coordinated with OI prior to the inspection and providing any information to the licensee.

0511 Appendix 0517.

a. Appendix 0517, Part I, provides procedures for receipt, control, processing, and disposition of allegations assigned to NRC Offices or Regions and the procedures and guidelines used to record the receipt, status, and disposition of allegations in the AMS.

b. Appendix 0517, Part II, provides guidance for granting and revoking confidentiality and for disclosing the identity of a confidential source outside of the NRC.

c. Appendix 0517, Part III, provides guidance for initiating, establishing priorities for and terminating investigations of matters involving potential wrongdoing.

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PART I

PROCEDURES FOR RECEIVING, SCREENING, ASSESSING, AND CONTROLLING ALLEGATIONS AND FOR THE ALLEGATION MANAGEMENT SYSTEM (AMS)

A. General

This Part establishes procedural guidance for receiving, screening, assessing, and controlling allegations that come to the attention of the NRC staff. These functions are to be established within each Region and Office under the control of an individual Office Allegation Coordinator (OAC), or a panel of staff personnel or other appropriate staff. The Regions and Offices will establish procedures consistent with this guidance and where appropriate provide the required training to ensure that their staffs are fully informed regarding the proper management of allegations.

Allegations pertaining to NRC-licensed facilities and activities may come to the attention of the NRC staff by telephone, letter, news media reports, or in person at sites, in offices, at meetings, and even at social functions. All allegations are subject to processing in accordance with this chapter. It is imperative that allegations be recognized as such by staff members and processed professionally, promptly, and with consistent treatment.

It is very important to note that the NRC does not recognize the term "off-the-record." Allegers who wish to provide off-the-record information must be clearly advised that information important to NRC regulatory concerns cannot be treated off the record, but that the information will be accepted officially and acted upon as necessary.

As a general rule, the need-to-know principle should be used when dealing with the protection of an alleger's identity. However, unless a Confidentiality Agreement (Exhibit 2) has been executed making the alleger a confidential source, an alleger's identity may have to be revealed. In those limited cases where a Confidentiality Agreement is extended to an alleger it will provide the maximum protection regarding an alleger's identity. The guidelines in Appendix 0517, Part II, should be followed in extending or revoking a Confidentiality Agreement. Part II also provides guidance as to when a confidential source's identity may be revealed outside of the NRC.

NRC employees, particularly resident and Regional inspectors, Regional supervisors, and OACs who are expected to receive the majority of allegations, should become fully familiar with the prescribed policies and procedures to ensure that the required actions are performed.

It is the responsibility of all employees who receive allegations to take whatever steps are necessary to ensure that an appropriate OAC is promptly informed. Whenever possible, the person making the allegation should be referred to either the OAC, other individuals as designated by the Region or Office, or arrangements should be made for the OAC or designated staff member to recontact the individual.

B. The Office Allegation Coordinator (OAC)

1. The initial responsibility of the OAC is to identify the proper Action Office to which the allegation should be assigned for evaluation and resolution in coordination with other OACs (either in the Offices or Regions).

2. The OAC serves as a focal point for processing and control of all allegations assigned to the Regions and Offices. The OAC in the Action Office is responsible for:

   a. entering allegations into the AMS.
   b. tracking allegations from initial receipt to final resolution.
   c. assuring establishment and maintenance of files that clearly identify allegations assigned to the Region or Office.
   d. documenting actions initiated to resolve allegations.
   e. ensuring that management and cognizant staff are informed of allegations under their purview.
   f. maintaining the current status of allegations in the AMS.
   g. ensuring that the final resolution of allegations is properly documented.
   h. ensuring that the alleger receives information on the resolution of his/her concern(s).

3. The OAC assists technical staff members who are reviewing allegation information, primarily in the form of coordinating activities necessary to resolve issues. In addition, the OAC may assist in the formulation of a course of action to resolve issues.

4. A panel, which includes the OAC as a member, may be designated with the primary responsibility to ensure that all allegations are promptly assigned and properly evaluated, and that the actions taken to resolve the allegation, as well as the resolution, are properly documented and transmitted to the alleger and the affected organization as appropriate.

5. The OAC may also serve as the point of contact with the Department of Labor on matters involving discrimination under Section 210(a) of the Energy Reorganization Act and will coordinate as necessary with OI and the Office of Enforcement. (See also C.4., below.)

C. Receipt of an Allegation

1. Allegations Received by Telephone or Personal Visit

Any NRC employee who receives a telephone call from someone who wishes to make an allegation should have the caller transferred to the OAC or appropriate staff in the Office or Region. Likewise, if an individual appears in person at an NRC Office, the individual should be referred to the OAC or other appropriate staff member. Employees, when unable to refer the telephone call or the visitor as described, shall obtain as much information as possible from the individual. (See paragraph 3, below.)

2. Allegations Received by Mail

All staff will forward correspondence that appears to contain an allegation to the OAC. Both letters and envelopes will be forwarded and no copies will be made. An employee who receives direct correspondence, including internal NRC memoranda, that contains allegations shall forward the correspondence to the OAC. All personnel who may come into possession of this type of correspondence also should be made aware that correspondence containing information which could reveal the identity of an alleger should be transmitted in a sealed envelope marked "To Be Opened by Addressee Only"; for expedited transmittals (e.g., electronically), such information should be deleted from correspondence.

3. Discussions with Alleger

Any employee receiving a telephone call or visit, as discussed in 1., above, shall attempt to obtain as much information as possible from the individual. It is crucial to identify:

a. full name
b. complete mailing address
c. telephone number where the individual may be contacted
d. position or relationship to facility or activity involved
e. nature of allegation

If the alleger declines to provide the above information, attempt to establish the reason(s) using the following guidance:

Explain that Public Law 95-601 (i.e., Section 210 of the Energy Reorganization Act) affords protection to the alleger by prohibiting an employer from discriminating against an employee for contacting the NRC. If the alleger continues to be reluctant to provide sufficient information to evaluate his/her concern or expressly requests confidentiality, a Confidentiality Agreement (Exhibit 2) may be extended in accordance with the guidelines in Appendix 0517, Part II, B. NRC-0517-054 provides further information regarding protection of confidentiality. If an alleger persists in declining to cooperate, i.e., refuses to enter into a Confidentiality Agreement and provide relevant information, the alleger should be informed that the agency may consider issuance of a subpoena to obtain needed information.

The alleger may be informed that the NRC employee with whom he/she is in contact does not have the capability to evaluate the information, to determine follow-up action, or to establish NRC jurisdiction; therefore, it may be necessary that someone else contact the alleger for additional information.

The alleger should also be informed that--unless an objection is made--he/she will be recontacted as soon as possible regarding the allegation. This may be done by telephone, personal visit, or by a letter to the alleger, at an address designated, which will also acknowledge the receipt of the allegation. This process will permit the alleger to review the information with the NRC to provide maximum assurance that the information has been correctly interpreted and understood.

If the alleger persists in not offering identification after the above explanations, document the allegation in as much detail as possible and advise the alleger that he/she may contact the OAC or designated staff member in 30 days or any other agreed upon period, for information on the status of any actions being taken on the information supplied.

4. Allegations of Violations of Section 210(a) of the Energy Reorganization Act

a. Allegations of discrimination that fall under Section 210(a) of the Energy Reorganization Act shall be entered in the AMS. The alleger should be informed that to ensure his/her personal employee rights are protected, he/she must file a written complaint with the U.S. Department of Labor within 30 days of the occurrence of the discriminatory act. Complaints should be filed with the Office of Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Room 53502, 200 Constitution Avenue, N.W., Washington, D.C. 20210, or the Regional DOL Office having jurisdiction over the matter. The alleger should also be informed that the NRC will investigate the allegation. Generally, the NRC will await the results of the DOL investigation, which the NRC will monitor. In some cases, NRC may take action independent of DOL. (See c., and d., below.)

b. The OAC should promptly notify the Regional DOL office to ensure their awareness of verbal or written complaints and request that they provide information as to their investigative intent in the matter when it has been determined. Written discrimination complaints received concerning possible violation of Section 210(a) will be forwarded to the appropriate Regional DOL Office having jurisdiction with a request that they provide their investigative intent when determined. In the case of written complaints, the complainant will be notified that the complaint was forwarded to DOL for action. In either case, the Action Office shall determine the need for an NRC investigation and refer to OI as necessary. (See c., below.) The Director, Office of Enforcement, should also be notified of each such complaint.

c. Staff should normally await completion of DOL investigations and other proceedings before initiating its own investigation of the intimidation and harassment aspects of the complaint of discrimination. However, if an allegation is made to the NRC that involves significant public health and safety implications, e.g., the allegations of intimidation or discrimination are so widespread as to require immediate action or involve high levels of management, the NRC can and should take certain action immediately without waiting for DOL. The action to be taken should be determined on a case-by-case basis and should include consideration of immediate NRC investigation and enforcement action for specific acts of discrimination, action to identify patterns of discrimination and levels of management involvement to bring to the attention of the licensee, and enforcement conferences and management meetings to discuss possible licensee actions with regard to the potential chilling effects of discrimination.

d. Technical issues can be examined through the inspection process and should be acted upon without regard to what action may be taken by the Department of Labor.

e. The OAC will take reasonable steps to facilitate DOL's investigation by assisting DOL in obtaining access to licensed facilities and any necessary security clearances. Regional management or OGC should be contacted on access problems.

f. In addition to allegations concerning intimidation and harassment or discrimination, the alleger should also be asked if he/she has specific safety concerns. If so, these concerns should be entered into the AMS and resolved.

D. Action by the Receiving Employee and the Office Allegation Coordinator (OAC)

1. When an allegation concerning an NRC-regulated activity is received, the employee receiving the allegation will provide the information obtained to the Receiving Office OAC who will complete an NRC Form 307, Allegation Data Form. The Action Office is then identified by the Receiving Office OAC in consultation with OAC in the potential Action Office and the completed form and all documentation regarding the allegation will be forwarded by the Receiving Office OAC to the Action Office OAC.

2. The Action Office will enter the pertinent information in the AMS in accordance with these procedures. All allegations, except those alleging improper conduct by NRC employees or NRC contractors (see 10., below), must be entered into the AMS. In this way an "audit trail" will be established so that NRC actions can be properly monitored and completed. The OAC or other designated staff member will ensure that the alleger is properly contacted to acknowledge receipt of the allegation and to confirm the specifics of the allegation. The OAC will provide copies of the allegation documentation to the cognizant technical staff supervisor for evaluation and initiation of action. If the alleger is a confidential source, the staff should be provided copies of sanitized documents. When responsibility for the handling of an allegation is transferred from one organizational unit to another, the alleger should be notified of the new point of contact (name and telephone number) by the individual who is relieved as contact in order to assure continuity. A single point of contact should be the rule.

The OAC will follow up on the allegation with the cognizant technical staff supervisor at periodic intervals until the matter has been satisfactorily resolved. When the case is closed, an update should be made to that effect in the AMS.

3. The OAC will coordinate allegation information with the technical staff and may assist in determining whether the information is sufficient to identify the issues. If the information is determined to be insufficient, the OAC or designated staff member will assist in further contact with the alleger. A single point of contact with an alleger provides a means of better controlling communications, aids in developing rapport, establishes continuity in the flow of information between the Regions and other NRC Offices, and aids in protection of the alleger's identity.

4. The OAC assists the cognizant technical staff in identifying and separating the issues involved in an allegation into one of the following categories:

   a. Allegations that involve technical matters, such as: inadequacies in the design, construction or operation of a licensed facility; inadequacies in procedures, qualifications, or training; inadequate implementation of procedures; inadequate corrective actions; or over-exposure(s) to radiation.

   b. Allegations where there is a reasonable basis for belief of wrongdoing and for which the staff determines an investigation is necessary to determine whether regulatory action is required such as: record falsification; willful or deliberate violations; material false statements; discrimination under Section 210(a) of the Energy Reorganization Act; or other improper conduct.

   c. Allegations that involve matters outside the jurisdiction of NRC.

5. Technical issues in category 4.a. involving failure to meet requirements have the potential for being willful or deliberate violations. Normally, in the absence of specific allegations of willfulness or deliberateness, such issues will be handled as technical issues and resolved using program resources. However, staff should remain alert to implicit allegations and/or indicators of willfulness that may emerge. If an allegation covers issues that affect other Regions or Offices, follow-up activities will be coordinated with the affected Offices and a Lead Office will be designated. The OAC will contact the affected Offices which should result in a mutual agreement as to which Office or Region should have the lead. If agreement cannot be reached at the OAC level, then the issue should be elevated through NRC management until agreement is reached.

6. Allegations in category 4.b., except for those involving NRC employees or NRC contractors (see 10, below), should be referred to OI Field or Headquarters Offices in accordance with the guidelines in Appendix 0517, Part III. Requests for an investigation by OI must be made using the "Request for Investigation" form

(Exhibit 3) and distributed as indicated on the form. Upon receipt of the completed form, OI will evaluate the request and conduct consultations as necessary with the requesting office. If a request is not accepted, OI will provide the requester with the basis for its decision. Any differences between the staff and OI on the need for or priority of an investigation shall be resolved in accordance with the process described in Appendix 0517, Part III.

7. When applicable, the Action Office should notify other agencies such as the Occupational Safety and Health Administration, DOE, etc., in dealing with allegations in category 4.c. Notification to Federal law enforcement agencies and State and local jurisdictions is the responsibility of the appropriate OI Field Office or the Office of Inspector and Auditor (for matters falling within its purview only).

8. Allegations involving discrimination under Section 210 should be entered in the AMS. In addition to informing an alleger of his/her rights under Section 210 the OAC also ensures that the allegation is processed in accordance with the provisions of C.4., above.

9. If an allegation is determined to have generic implications, other Offices and/or Regions with responsibilities that may be affected will be appropriately notified by the Action Office (e.g., AEOD for operational data, RES for concerns affecting research activities, etc.).

10. Allegations regarding suspected improper conduct by NRC employees and NRC contractors will be brought to the attention of appropriate management for referral to the Office of Inspector and Auditor (OIA). Allegations of this nature are not entered into the AMS. However, records should be maintained to show that such allegations have been referred to OIA. (See Chapter NRC 0702.)

E. Documenting Allegations

1. When an allegation is received and the action office identified, a working file should be established to contain all related documentation concerning the allegation, including all correspondence, memoranda to files, interviews, and summaries of telephone conversations, discussions, and meetings. This file shall be maintained in the official files of the Action Office in an officially designated location. The allegation source document must be maintained in this file and clearly marked with the allegation number. Allegations shall be filed, stored and retrieved by this allegation number and not by personal identifier of the alleger. To ensure proper evaluation, full and complete information should be documented about each allegation. In addition to obtaining basic information, attempts should be made to expand and clarify the information so that the issue is well defined. All allegations, regardless of source or how received, must be documented. Access to the official files is to be controlled. Files are to be locked when not in use. In addition, records or files containing the name or other identifying information of a confidential source should be stamped "Contains information which would reveal the identity of a confidential source" and access should be tightly controlled. The information

in these files shall not be reproduced without authorization of the OAC. The same controls apply to copies as to originals.

2. There will be occasions when the allegations obviously have no substance and appear to represent a distortion of facts. However, even in these cases, documentation that identifies the contact, the general content of any communications, and the basis for a conclusion that the matter need not be pursued is necessary. Instances such as these will be coordinated with the appropriate technical staff by the OAC to ensure proper disposition.

3. The importance of obtaining and documenting all pertinent information about an allegation cannot be overemphasized. Evaluation and screening of the allegation, as well as the proposed course of action that will be adopted to resolve the issue, will be based primarily on this information. In some cases, a personal interview with the alleger may be warranted. Depending on the nature of the allegation and the time sensitivity, assistance from the Office of Investigations (OI) or other resources may be requested.

4. As soon as possible after receiving an allegation, the person receiving the allegation shall notify the OAC. Normally, no action will be taken to verify the validity of the allegations, nor shall such matters be discussed with licensees until after the OAC or designated staff member has briefed appropriate NRC management.

5. The OAC or other designated staff member is responsible for reviewing all information received in conjunction with an allegation and for ensuring that management and cognizant technical staff members are fully informed.

6. Allegations normally should not be addressed in Preliminary Notifications (PNs) or Daily Reports (DRs); however, if it is determined that PN or DR entries are appropriate, the approval of an Office Director or a Regional Administrator should be obtained.

7. Transmission of information or files regarding allegations will be minimized. Special precautions must be taken for information that must be transmitted. If allegation documents which would reveal the identity of an alleger must be sent to other NRC personnel, the documents should be securely wrapped and marked "To be Opened by Addressee Only." The sender must ensure that the recipient has a need to know. In the case of a confidential source, the sender must verify the recipient is included on the list of individuals with a need to know maintained by the OAC. NRC personnel are to take all necessary steps to ensure that the identity of a confidential source is not revealed. (See NRC 0517-054.)

F. Evaluation by Cognizant Technical Staff

1. When an allegation package is received, the technical staff within the Office or Region will review the documentation to determine if there is a safety concern that requires immediate regulatory action. The

technical staff is responsible for development, initiation, and follow-through on corrective actions. Allegations or documents containing a substantial number of allegations once entered in the AMS can be screened using the following criteria:

a. Is there an immediate safety concern which must be quickly addressed?

b. Is the allegation a specific safety or quality issue or a generalized concern?

c. Has the staff previously addressed this issue?

d. Does the allegation package contain sufficient information for a thorough evaluation? If it does not, identify the additional information that is needed.

e. Are all aspects of the allegation adequately defined and described to permit or allow a meaningful evaluation? This is a screening process that may result in a decision not to consider the allegation further. If the latter is the decided course of action, the alleger should be so informed in a courteous and diplomatic manner along with the rationale for not considering it further. The potential for adverse publicity must be recognized when taking this action.

f. Is the identity of the alleger necessary for a thorough evaluation?

g. What specific issues are involved in the allegation? Can the issues be adequately addressed by a technical inspection?

h. Can the allegation be examined and resolved by investigation or during a scheduled inspection? If this is not possible, determine the best way to address the issues.

i. Can licensee/vendor resources reasonably be used in resolving the allegation to conserve staff resources? Consider potential problems associated with involving the licensee in the resolution process. (See NRC-0517-0510.)

j. Does the allegation have the potential to require escalated enforcement action?

k. What is the time sensitivity of the allegation, and what immediate actions are necessary?

l. Will investigative assistance be needed?

m. Identify peripheral issues that could develop.

n. Are any licensing or enforcement actions or board proceedings pending which could be influenced or affected by the allegation?

When an allegation involves a case pending before a licensing or appeal board or the Commission, information concerning it should be provided to NRR or NMSS as soon as possible to assist in the determination of whether or not a board notification should be made. This decision must be made promptly by NRR or NMSS in accordance with office procedures.

2. Action Office staff are also responsible for:

   a. Determining if other NRC Offices should be notified.

   b. Establishing a schedule for the resolution of each allegation which is consistent with the licensing schedule, if applicable.

   c. Notifying the OAC or designated staff member when the status changes or action(s) is complete.

3. It is the responsibility of the technical staff within the Office or Region to resolve each allegation that falls under its jurisdiction, and subsequently, to notify the OAC or designated staff member of the action taken so that the status of each allegation can be tracked to closeout. Final resolution of an allegation shall be documented and placed in the working file along with all supporting documentation. The final report should state the facts clearly.

4. For those allegations resulting in the need for corrective action, the affected organization(s) shall be properly informed recognizing the need to protect the identity of the alleger.

G. Allegation Resolution Documentation

1. Allegation resolution documentation officially closes the file for that case and shall be placed in the working file which now becomes a closed case file.

2. A final report or document should be prepared that sets forth the facts about the allegation and its resolution clearly and conclusively. The final report can be a memorandum for a relatively minor matter, a report of investigation, an inspection report, or a technical paper for a complex or major generic matter. It can be an SER supplement for multiple allegations proximate to OL issuance. It should not contain the name of, or material that could be used to identify, the alleger. (See NRC-0517-054.)

3. The final report should include a summary of the concern, a description of the evaluation performed and the conclusions drawn.

4. Appropriate entries should be made in the AMS to close out the allegation.

5. When the final report has been approved (i.e., the case is closed), all allegation documentation is subject to release under the FOIA with appropriate precautions to protect confidentiality. Until that time,

all allegation documentation is exempt from release under the FOIA in accordance with 10 CFR 9.5 Exemption (7) due to actual, or the potential for, law enforcement action. An FOIA request received during the open stage, however, will "freeze" those documents in the file at that time for FOIA processing. In the absence of an FOIA request, management may freely review case files when an allegation is closed and retain only those documents necessary to account for official action.

6. Reports issued by the Office of Investigations may contain information which could reveal the identity of confidential sources. If so, the report will be clearly marked to alert the recipient/reader to the sensitivity of the document. OI memoranda transmitting such reports will also indicate that the report may reveal the identity of confidential sources. The EDO and Regional Administrators will make determinations regarding further distributions of such reports on a need-to-know basis.

H. Dissemination of Final Report

1. A copy of the final report appropriately sanitized to protect privacy interests of persons and proprietary information shall be sent to the alleger and, if appropriate, to the affected outside organization(s). A transmittal letter may be needed to summarize the matter. This should occur after civil and criminal enforcement actions, if any, have taken place.

2. The foregoing does not apply to OI investigative reports. However, if an OI report is the primary document relied upon in the resolution of an allegation, the alleger should be provided with a summary of the report. If the summary has not been publicly released, OI's concurrence should be obtained prior to release of the summary.

I. Allegation Management System

1. General

a. For purposes of the Allegation Management System (AMS) the definition provided for an allegation is very general and broad. The significance or nonsignificance of an allegation will be judged during the Action Office review and follow-up activities. There is to be no screening of allegations for possible deletion prior to entering them into the system (except for duplication of entries). The AMS should provide a vehicle for collecting, storing and retrieving all key information regarding all allegations. The Action Office determines the necessary action to be taken based upon the specifics of the case. Some allegations may be received and closed out the same day.

b. The AMS provides basic descriptive and status information and serves as a referral system. It identifies the office and staff to contact for more specifics on an allegation. Additionally, it keeps the staff informed as to how the allegation was resolved and provides reference to the close out documentation.

c. When an allegation is received, it is not necessary to identify by separate entry into the AMS every component or subset of the allegation. For example, if an allegation is received that consists of 15 separate concerns of wrongdoing and technical deficiencies, the allegation may be entered as one allegation. However, the description of the allegation should include the number of separate concerns and their subject area. In some cases there may be a distinct grouping of concerns; for example, in two areas such as training and quality assurance. In such a case it may be appropriate to enter two allegations. A main objective is to ensure that the receipt of an allegation is entered and tracked in the system. An allegation is not completed and closed until an Action Office supervisor determines that appropriate action has been taken.

d. Sensitive information such as the names of non-NRC persons or personal identifiers shall not be entered in the system. All information entered shall be unclassified and shall not contain any safeguards information or any proprietary or commercial (2.790) information.

e. Some allegations may require action by two or more offices. For purposes of entering the allegation into the AMS either separate entries should be made for each Action Office for its assigned action or one entry may be made with the involved OACs agreeing on the lead Action Office for followup of the allegation. If another Office is involved in responding to an allegation, it should be so indicated in the "remarks" section.

2. Interfaces with the Office of Investigations

a. The Office of Investigations has jurisdiction over all allegations where there is a reasonable basis for belief of wrongdoing and for which the staff determines an investigation is necessary to determine whether regulatory action is required except those involving NRC employees or NRC contractors. OI may also open and conduct investigations on its own initiative. OI will forward all allegations it receives to the appropriate Office or Region. The Office or Region will be responsible for entering all allegations--even those under the purview of OI--into the AMS using a Region or Office AMS number.

b. For those allegations of wrongdoing, except those involving NRC employees or NRC contractors, assigned to the Region or Office:

(1) The Region or Office OAC will coordinate with the OI Field Director or OI Headquarters representative to determine if sensitive information is included which should not be placed into the AMS. All sensitive information is to be

deleted and the word "sensitive" put in its place. However an attempt should be made to provide descriptive material to assist the AMS user to the maximum extent possible.

(2) The Region or Office OAC will assign a Region or Office AMS number. The OI assigned number should be entered in the AMS as a cross-reference.

(3) The name and phone number of the OI Field Director or OI Headquarters representative will be placed in the appropriate section of the form as the Action Office contact.

(4) The OI Field Director will keep the Region or Office OAC apprised of the status of the allegation investigation and provide timely information necessary to determine the safety significance of the allegation to appropriate Regional or Office management and for use in updating the AMS.

(5) The allegation will be considered closed when the investigation report has been issued and when no technical issues remain. Otherwise, the allegation remains open, reference is made to the technical report or OI investigation report if either is complete, and a schedule for resolution of the allegation is placed in the AMS.

c. For allegations of wrongdoing received by OI, the OI Headquarters or Field Director will coordinate with the respective Office or Region OAC who will complete the items 2.b.(1) through (5), above.

d. For allegations of a technical nature received by OI, the OI Headquarters or Field Director will contact the respective Office or Region and follow the procedures as indicated in item 3., below, for the Receiving Office.

e. OI's review of allegations for potential wrongdoing shall be documented in the allegation case file.

3. Receiving Office

Upon receipt of an allegation involving an NRC-regulated activity, the person receiving the allegation will provide the information relative to the allegation (see Exhibit 1) to the OAC who will initiate steps required to identify the Action Office and, if the Receiving Office is the Action Office, enter the allegation into the AMS.

The Receiving Office OAC should, in addition to determining the appropriate Action Office, coordinate with the Action Office, and receive concurrence from the Action Office before transfer of responsibility.

4. Action Office

The Action Office shall:

a. Complete that portion of the Allegation Data Form marked "Action Office," assign an allegation number to it, and enter the allegation into the AMS within 10 working days from the date of receipt of the allegation by the office.

b. Review and, where necessary, update the status of all open allegations in the AMS on a monthly basis.

c. As soon as possible after the receipt of an allegation and relevant information has been reviewed and evaluated, make a preliminary determination of safety significance and the need for any regulatory action.

d. Schedule the resolution of each allegation to be consistent with the licensing schedule and the safety significance of the allegation.

e. Make a determination regarding the need for a board notification to NRR or NMSS. If the initial board notification is preliminary in nature, a follow-up notification is sent to boards when evaluation is completed, or whenever significant relevant information is identified during the course of evaluating the allegation. This determination should be made as soon as possible in accordance with the Action Office board notification procedures.

f. Develop and maintain a working file for each allegation, which will contain all related documentation. For those allegations comprised of multiple concerns, separate working files may be needed for each concern.

g. Thirty days prior to the construction completion date (applicant's estimate) for each pending OL, each Action Office will forward to the appropriate licensing organization in NRR an evaluation of the safety significance of all allegations not scheduled to be resolved before the construction completion date, with a recommendation as to whether any or all of them constitute grounds for delaying issuance of (or otherwise restricting) an operating license. (See NRC-0517-059.)

h. Thirty days prior to a Commission decision on authorizing full-power operation, a report similar to item g., above, will be prepared and forwarded to NRR.

i. Protect the identity of all allegers and, when confidentiality has been granted, assure that the added controls in this chapter are implemented.

5. NRR OAC

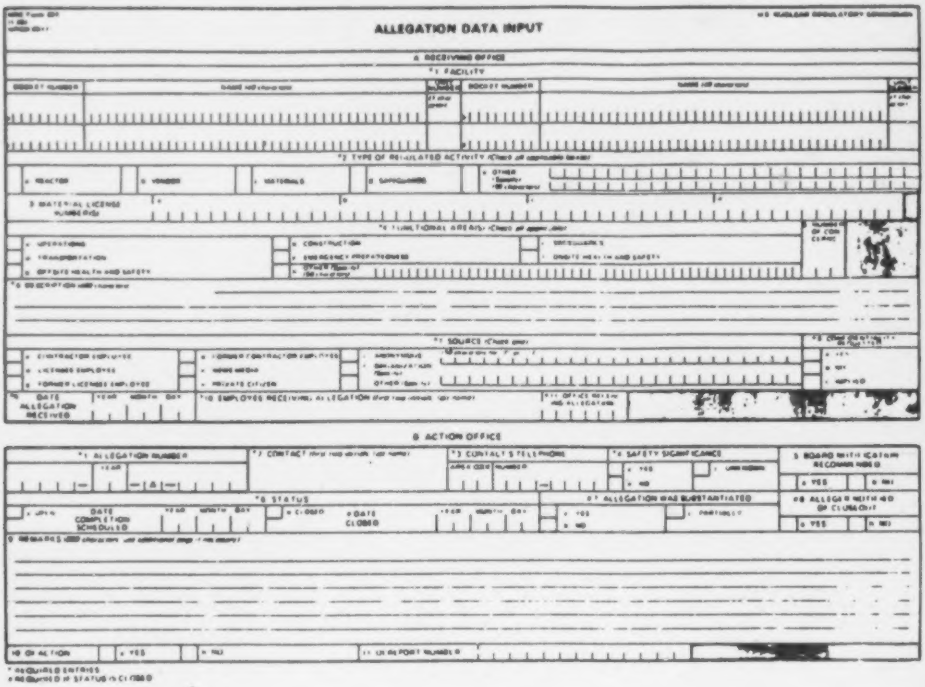
In addition to the normal OAC responsibilities, the NRR OAC:

a. Manages the AMS. Coordinates and evaluates requests for AMS enhancements and system improvements and authorizes RM to make the changes.

b. Authorizes and requests that special reports be prepared from the AMS database for use by NRC staff and management.

c. Is responsible for conducting programmatic reviews of the implementation of the policies and procedures in this chapter and appendix.

EXHIBIT I



ALLEGATION DATA INPUT

A. RECEIVING OFFICE

*1 FACILITY

*2 TYPE OF REGULATED ACTIVITY

3 MATERIAL LICENSE NUMBER(S)

*4 FUNCTIONAL AREA(S)

*7 SOURCE

DATE ALLEGATION RECEIVED

B. ACTION OFFICE

*1 ALLEGATION NUMBER

*2 CONTACT

*3 CONTACT'S TELEPHONE

*4 SAFETY SIGNIFICANCE

5 BOARD NOTIFICATION RECOMMENDED

*6 STATUS

7 ALLEGATION WAS SUBSTANTIATED

9 REMARKS

* REQUIRED ENTRIES

PART II

PROCEDURES FOR GRANTING AND REVOKING CONFIDENTIALITY AND DETERMINING WHEN THE IDENTITY OF A CONFIDENTIAL SOURCE MAY BE RELEASED OUTSIDE OF THE NRC

A. General

On November 25, 1985, the Commission issued its Statement of Policy on Confidentiality (Policy Statement) to provide a clear, agency-wide policy on confidentiality. 50 Fed. Reg. 48506 (November 25, 1985). There, the Commission recognized that its inspection and investigatory programs rely in part on individuals voluntarily coming forward with information. Some individuals will come forward only if they believe their identities will be protected from public disclosure; i.e., only if they are given confidentiality. Safeguarding the identities of confidential sources is, therefore, a significant factor in assuring the voluntary flow of such information. The Policy Statement applies to all Commission offices and directs those offices to make their best efforts to protect the identity of a confidential source. The following procedures are to be followed in implementing the Commission's Policy Statement.

B. Granting Confidentiality

1. Confidentiality is not to be granted as a routine matter. Rather, confidentiality should be granted only when necessary to acquire information related to the Commission's responsibilities or where warranted by special circumstances. It should ordinarily not be granted when the individual is willing to provide the information without being given confidentiality. Consequently, if an alleger is providing information willingly, confidentiality should not be granted and the individual should not be advised of its availability. Nonetheless, NRC employees should only reveal the identities of allegers on a need-to-know basis.

2. If an explicit request for confidentiality is made, the request should not be automatically granted. Rather, information should be sought from the alleger to make a determination as to whether the grant of confidentiality is warranted in the particular circumstances at hand. The following information should be solicited from the alleger to assist in making this determination.

   a. Has the alleger provided the information to anyone else; i.e., is the information already widely known with the alleger as the source?

   b. Is the NRC already knowledgeable of the information, thereby obviating the need for a particular confidential source; i.e., why subject the NRC to the terms of a Confidentiality Agreement unless necessary?

c. Does the alleger have a past record which would weigh either in favor of or against granting confidentiality in this instance; i.e., has the alleger abused grants of confidentiality in the past?

d. Is the information which the alleger offers to provide within the jurisdiction of the NRC; i.e., should he be referred to another agency?

e. Why does the alleger desire confidential source status; i.e., what would be the consequences to him if his identity were revealed?

f. Does it appear that the alleger himself caused the condition or committed the violation and so could likely be subject to civil and/or criminal prosecution?

Depending on the information gathered by the authorized NRC employee, a determination should be made as to whether granting confidential source status would be in the best interest of the agency.

3. When an alleger does not expressly request confidential source status, an authorized NRC employee may raise the issue of confidentiality in certain circumstances. Such circumstances can vary widely. Authorized NRC employees have discretion to raise the issue of confidentiality when, in their judgment, it is appropriate. Considerations in making this judgment would include:

   a. When it becomes apparent that an individual is not providing information because of a fear that his/her identity will be disclosed.

   b. When it is apparent from the surrounding circumstances that the witness wishes his/her identity to remain confidential; e.g., is the interview being conducted in a secretive manner or is the alleger refusing to identify himself?

   Once the issue of confidentiality is raised with the alleger and he/she indicates a desire for confidential source status, the same considerations that apply to an explicit request for confidentiality would apply here. See 2., above.

4. When granting confidentiality, the following points should be discussed with the alleger:

   a. The sensitivity of the information being provided by the source should be explored with a view to determining whether the information itself could reveal the source's identity.

   b. The source should be informed that, due to the tight controls imposed on the release of his identity within the NRC, he should not expect others within the NRC to be aware of his confidential source status and it would be his responsibility to bring it to the attention of NRC personnel if he desires similar treatment for the information provided them.

c. If inquiries are made of the NRC regarding his status as a confidential source, the agency will neither confirm nor deny his status.

d. The basic points of the standard Confidentiality Agreement should be reviewed if it is not possible to provide the individual with a copy to read.

5. An NRC employee wishing to grant confidentiality must either be expressly delegated the authority to do so or must seek authorization from the appropriate Office or Regional official. Authorization can be prearranged as circumstances warrant. This might include a planned meeting with an alleger. The Director, OI, the Director, OIA, and the EDO may designate those persons within their organizations who may grant confidential source status and/or further delegate the authority to do so. Authority to grant confidential source status is to be documented in writing either through a standing delegation or an ad hoc authorization. In special circumstances, an oral authorization is permissible if confirmed in writing. The standard Confidentiality Agreement (Exhibit 2) is to be executed. The circumstances surrounding a grant of confidentiality must be documented in a memorandum to the OAC.

6. In those circumstances where it is impossible to sign a Confidentiality Agreement at the time the information is obtained; e.g., when the information is obtained over the telephone, or in a location not conducive to passing papers, confidentiality may be given orally pending signing of the Confidentiality Agreement within a reasonable amount of time, generally two weeks. If documentation is not completed in that time frame, the EDO or the Director, OI, or the Director, OIA, will determine if confidentiality continues. See Part II, C., below. If confidentiality is granted orally, this must be immediately documented by the person granting it and noted in the memorandum to the OAC.

7. Office Directors and Regional Administrators must be informed of each grant of confidentiality issued by their office pursuant to a delegation of authority. These senior officials must also approve any variance to the standard Confidentiality Agreement and each denial of confidentiality.

8. The OAC of each Office and Region will maintain an accurate status regarding grants of confidentiality made by the particular Office or Region to include copies of signed Confidentiality Agreements. A confidential source will be revealed within the NRC on a need-to-know basis only. Any employee with access to the identity of the confidential source must take all necessary steps to ensure that this information is not further disseminated. (See NRC-0517-054.)

With regard to protecting a source, account should be taken of disclosing information which may reveal the source. The removal of the source name and identifiers may be adequate, but circumstances might exist where particular information itself may reveal the source.

The OAC is also responsible for maintaining secure files when files contain information which would reveal the identity of a confidential source and marking such files "Contains information which would reveal the identity of a confidential source." Each employee who has access to information which would reveal a confidential source; i.e., has been found to have a need to know, shall take all necessary steps to prevent disclosure of the information to unauthorized personnel. For example, when written information which would reveal a source is not being used, or is not within personal control of the NRC employee, it shall be kept in locked storage.

9. In communications and contacts with individuals who have been granted confidentiality, NRC staff must make their best effort to assure that such communications and contacts do not result in the disclosure of the individual as a confidential source. Such efforts may include the use of non-government return addresses, plain envelopes and rental cars as opposed to government-owned vehicles.

10. If at any time for any reason confidentiality is breached or jeopardized, the appropriate Regional Administrator or Office Director should be informed. The confidential source should be advised. The Director of the Action Office shall be responsible for reviewing the circumstances associated with the release of identity of the confidential source and will assure that necessary actions are taken to preclude repetition. Such review and actions shall be documented in the allegation file.

C. Revocation of Confidentiality

1. A decision to revoke confidentiality can only be made by the Commission, the EDO, or the Director of OI or OIA. The EDO and the Directors of OI and OIA may only revoke grants of confidentiality originally made by their respective offices, or in the case of the EDO, by offices reporting to him/her. In addition, the Commission may revoke a grant made by any office. Confidentiality will be revoked only in the most extreme cases. Case for consideration include where a confidentiality agreement is not signed within a reasonable time following an oral grant of confidentiality, or where a confidential source personally takes some action so inconsistent with the grant of confidentiality that the action overrides the purpose of the confidentiality; e.g., disclosing publicly information which has revealed his status as a confidential source or intentionally providing false information to the NRC.

2. Before revoking confidentiality, the NRC will attempt to notify the confidential source and provide him/her with an opportunity to

explain why confidentiality should not be revoked. All written communications with a confidential source which require/request a reply are to be sent CERTIFIED MAIL-RETURN RECEIPT REQUESTED.

D. Official Disclosures

1. Disclosure to the Licensee or Other Affected Organization

If the information provided by a confidential source involves a potentially significant and immediate impact on the public health and safety, the affected organization should be promptly informed to assure proper and timley action. In some cases, release of the information will compromise the identity of the confidential source. In such cases, release should normally not be made unless the release is necessary to prevent an imminent threat to public health and safety. In such cases, the EDO shall be consulted and efforts will be made to contact the confidential source and explain the need for disclosure. As the alleger may also be an OI confidential source, the Director, OI, shall be contacted. Consistent with the Commission's Policy Statement, however, disclosing information which would reveal the identity of a confidential source will be made only following best efforts by the agency to protect or limit the possibility of disclosure.

2. Other Disclosures

NRC employees may be directed by court order, or requested by an NRC adjudicatory body, Congress, or State or Federal Agencies to provide information which may reveal the identity of a confidential source. Each such request will be handled on a case-by-case basis. Points to consider, however, are discussed below:

a. Court Order

There are conceivable circumstances where a licensee or other entity could obtain a court order requiring the NRC to divulge the identity of a confidential source. If that happens, the NRC will seek to keep the disclosure limited, through protective orders or otherwise, to the minimum necessary.

b. NRC Adjudicatory Bodies

The second category of circumstances where a confidential source's identity might be disclosed outside the NRC involve a disclosure during an NRC adjudicatory proceeding. The Commission, as the ultimate adjudicatory authority within the NRC, can require the NRC staff to reveal a confidential source. The Commission in a separate Statement of Policy on Investigations, Inspections, and Adjudicatory Proceedings has provided that any Licensing Board decision to order disclosure of the identity of a confidential source shall be automatically certified to the Commission for review. 41 FR 36032 (September 13, 1981). Therefore, the only adjudicatory board within the NRC with the actual authority to require that the identity of a confidential source be revealed is the Commission.

In making such a decision, the Commission will consider whether the information provided by the confidential source is reasonably available through alternative means, whether it relates directly to the substantive allegations at issue in the proceedings, what the present employment position of the confidential source is, whether a party's right to present rebuttal evidence or to conduct the cross-examination will be violated if he/she is not provided the names, and whether disclosure is necessary to complete the record. After considering the relevant factors, the Commission will order release only if necessary. The Commission notes in this regard that, unlike the case of a criminal prosecution, the NRC may not have the option of dismissing a case to avoid disclosing a confidential source, as for instance, when the identity of the source is material and relevant to a substantial safety issue or a licensing proceeding.

c. Congress

Disclosure to Congress may be required in response to a written Congressional request. The Commission will disclose the identity of a confidential source to Congress only if the request is in writing and it will make its best efforts to have any such disclosure limited to the extent possible. This might include assuring that the request is by Congress in its official oversight capacity; the hand delivery of requested information directly to the affected Congress person; and attempting to satisfy the request for information by not revealing the identity of the confidential source.

d. Federal and State Agencies

If another agency demonstrates that it requires the identity of a confidential source or information which would reveal a source's identity in furtherance of its statutory responsibilities and that agency agrees to provide the same protections to the source's identity that the NRC promised when it granted confidentiality, the action office OAC will make a reasonable effort to contact the source to determine if he/she objects to the release. If the source is reached and does not object, the EDO or his designee or the Directors of OI or OIA are authorized to provide the information or the identity to the other agency.

If the source cannot be reached or objects to the release of his/her identity, the source's identity may not be released without Commission approval. The affected agency may then request that the Commission itself release the identity. Ordinarily, the source's identity will not be provided to another agency over the source's objection. In extraordinary circumstances where furtherance of the public interest requires a release, the Commission may release the identity of a confidential source to another agency over the objections of the source. In those cases, however, the other agency must agree to provide the same protections to the source's identity that were promised by the NRC.

CONFIDENTIALITY AGREEMENT

I have information that I wish to provide in confidence to the U.S. Nuclear Regulatory Commission (NRC). I request an express pledge of confidentiality as a condition of providing this information to the NRC.

It is my understanding that, consistent with its legal obligations, the NRC, by agreeing to this confidentiality, will adhere to the following conditions.

(1) During the course of an inquiry or investigation, the NRC will make its best effort to avoid actions which would clearly be expected to result in disclosure of my identity to persons subsequently coming in contact with the NRC.

(2) Except as necessary to assure public health and safety and except as necessary to inform Congress or State or Federal agencies in furtherance of their responsibilities under law or public trust, the NRC will not identify me by name or personal identifier in any conversation, communication or NRC-initiated document released outside the NRC. The NRC will use its best effort to minimize any disclosures made outside of the NRC.

(3) The NRC will disclose my identity inside the NRC only on a need-to-know basis to the extent required for the conduct of NRC-related activities. Consequently, I acknowledge that if I have further contacts with NRC personnel, I cannot expect that those people will be cognizant of this Confidentiality Agreement and it will be my responsibility to bring that point to their attention if I desire similar treatment for the information provided to them.

(4) Even though the NRC will make its best effort to protect my identity, my identification could be compelled by orders or subpoenas issued by courts of law, hearing boards, Administrative Law Judges, or similar legal entities. In such cases, the basis for granting this promise of confidentiality and any other relevant facts will be communicated by the NRC to the authority ordering the disclosure in an effort to maintain my confidentiality.

I also understand that the NRC will consider me to have waived my right to confidentiality if I take, or have taken, any action so inconsistent with the grant of confidentiality that the action overrides the purpose behind the confidentiality such as (1) disclosing publicly information which reveals my status as a confidential source or (2) intentionally providing false information to the NRC. The NRC will attempt to notify me of its intent to revoke confidentiality and provide me an opportunity to explain why such action should not be taken.

Other Conditions: (if any)

I have read and fully understand the contents of this agreement. I agree with its provisions.

Date:

Name:
Address:

Agreed to on behalf of the U.S. Nuclear Regulatory Commission.

Date:

Signature:
Name:
Title:

PART III

GUIDANCE FOR INITIATION, ESTABLISHMENT OF PRIORITIES AND TERMINATION OF INVESTIGATIONS

A. General

On January 10, 1986, the Commission approved the guidelines proposed by the Staff and the Office of Investigations (OI) for initiation, establishment of priorities and termination of investigations. The Commission concluded that uniform guidelines should be used by both the Staff and OI in establishing priorities for investigations and that staff views on the need for and priority of an investigation were an integral part of the investigation process. The following procedures are to be followed in implementing the guidelines.

B. Referral by the Staff of Matters for Investigation

1. Regional Administrator and Office Directors, the latter through the EDO, shall refer to the Office of Investigations for possible investigation all matters where: (a) there is a reasonable basis for belief of wrongdoing, as that term is defined elsewhere in this chapter; and (b) the staff determines an investigation is necessary for it to decide whether enforcement or other regulatory action is required. Matters for which there is not a reasonable basis to believe wrongdoing is involved or matters which may involve wrongdoing but for which an investigation would be unnecessary to determine the appropriate course of action should not be referred to OI for investigation. For example, where a licensee discovers that a low-level employee deliberately violated a requirement or falsified a document, disciplines the employee and takes appropriate corrective action which the Staff has reviewed, the Staff may conclude that further NRC action is unnecessary.

2. All referrals to OI shall be made using the "Request for Investigation" form (Exhibit 3). A priority of high, normal or low will be assigned to the requested investigation using the examples set forth below as guidance. Each request to OI arising from an allegation should be coordinated with the OAC. OGC or Regional Counsel should also be consulted to review the legal basis for the referral. Copies of the completed request forms shall be distributed as indicated on the form.

3. As indicated above, the staff will recommend a high, normal or low priority for each matter referred to OI. The following examples may serve as guidance in assigning priorities. It should be recognized that these examples are just that. Judgment must still be exercised in each case to assure that the appropriate priority is established.

a. High

(1) Current manager, licensed operator or other employee involved in deliberate violation of requirements having high safety significance, e.g., continuing potential for unnecessary radiation exposure to employees or members of the public.

(2) Suspected tampering with vital equipment at a power reactor.

(3) Allegations of falsification of records available for NRC inspection or submittals to the NRC or deliberate withholding of information required to be reported to the NRC, where the situation involved presents an immediate and continuing health and safety concern, e.g.,

(a) falsification of records having high safety significance, such as falsifications which conceal a repeated failure to perform a required test;

(b) alleged withholding of significant design flaw or seismic criteria information for an operating facility; or

(c) level of individual involved in the alleged withholding of information or falsification is such that a serious question of the willingness of management to conduct safe operations is raised.

(4) Allegations of falsification of records available for NRC inspection or deliberate violations of NRC requirements concerning an area of significant safety concern for licensing.

(5) Allegations of wrongdoing where immediate investigation is necessary to ensure preservation and availability of evidence or which are in some other way time perishable.

b. Normal

(1) Allegations of intimidation or harassment of QC inspectors or workers on safety-related equipment at a facility under construction.

(2) Allegations of deliberate violations of NRC requirements where there is no indication the violation is recurring or causing immediate and direct health and safety impact on the general public or employees.

(3) Allegations of falsification of records available for NRC inspection or deliberate violation of NRC requirements of safety concern in the licensing process.

c. Low

(1) Allegations of deliberate violations of NRC requirements, falsification of records or submittals to NRC, or harassment or intimidation of workers where the licensee is aware of the allegation and has already undertaken corrective action.

(2) Allegations of deliberate violation of NRC requirements at an operating facility where there is no near-term safety concern; e.g., the reactor is in long-term shutdown.

4. Program offices are responsible to the EDO for assuring that within their areas of responsibilities necessary investigations are conducted. If the program office believes that a priority for a matter should be different than that requested by the Region, the Region should be contacted immediately to resolve the matter.

5. Once a matter has been accepted by OI for investigation, if the requestor of the investigation determines that the need for or priority of an investigation has changed, that information will be provided to the Director, OI, for his/her consideration.

C. Initiation of an Investigation by OI

1. Upon receipt of the "Request for Investigation" form, OI will evaluate the request and conduct consultations as necessary with the requesting office. OI will initiate an investigation if:

   a. The staff has found that the alleged wrongdoing has had or could have an impact on the public health and safety, the common defense and security, protection of the environment, or antitrust laws provided that these matters are within NRC jurisdiction; and

   b. The Director, OI, determines that there is a reasonable basis to believe that the matter involves wrongdoing; and

   c. The Director, OI, determines that there is sufficient information available to support the allegation to warrant initiation of an investigation.

2. If upon review of the request, there is a reasonable belief that the alleged wrongdoing is solely a product of careless disregard or reckless indifference, OI will not normally conduct an investigation unless the requester indicates that the matter requires application of OI resources because there are major regulatory implications and the Director, OI, concurs with this judgment.

3. OI will seek Commission guidance prior to initiating an investigation relating to the character/integrity of an individual in those instances where the character or suitability aspects of the matter being

considered for investigation are unrelated to a violation of NRC regulatory requirements.

4. OI will notify the requester within 30 days of receipt of the request whether the matter has been accepted for investigation and, if so, the priority assigned to the matter and the estimated schedule for completion. If a matter is not accepted for investigation, OI will provide the requester with the basis for its decision. Copies of OI correspondence on scheduling and priorities will be sent to all those who received a copy of the original request as indicated on the request form.

D. Resolution of Differences Between Staff and OI

1. Following OI notification of its action on a request for investigation, if the Regional Administrator has concerns about the priority or schedule assigned to the matter or the declination of OI to investigate at all, he shall promptly notify the Director of the appropriate program office of his concern.

2. The Director of the responsible program office will review disputed matters referred by the Regional Administrator and the priorities and schedules assigned on matters referred to OI directly by the program office. If the Director determines that an investigation priority or schedule established by OI or the lack thereof does not meet regulatory needs, and the matter cannot be resolved with the Director, OI, he/she will promptly notify the EDO.

3. The EDO will attempt to resolve all differences over the need for and priority and schedules for investigations with the Director, OI, and if unsuccessful, seek Commission resolution.

E. Termination of Investigations

1. The decision by OI to terminate an investigation which has been initiated will normally be made outside the context of the investigative priority/threshhold system. OI will normally continue an investigation to its conclusion if there is a reasonable basis for a belief that the matter being investigated involves a deliberate violation of NRC requirements. The decision to terminate an investigation will be a case-by-case assessment by the Director, OI, of such issues as whether the relevant facts necessary to resolve the matter under investigation have been gathered, whether allegations of events or conditions are so old that witnesses are unavailable or could no longer be expected to recall pertinent information, or whether continued investigation would be nonproductive or otherwise not serve the agency's interests.

2. As indicated in section B.5., above, if the requester of an investigation determines that the need for or priority of an investigation has changed, that information will be provided to the Director, OI, for his/her consideration.

3. For low and normal priority cases, OI may close a case if its projection of resource allocations indicates that the investigation could not be initiated within a reasonable period of time which will generally be six months. OI may close a case following its initial evaluation if at that time OI is able to make a projection of its resource allocations and the case would not be initiated within a reasonable period of time, e.g., six months.

4. OI will notify the staff in writing when it formally closes a case because of lack of resources to pursue it.

F. Resolution of Those Matters Returned to the Staff By OI Without Investigation

Those matters which are returned to the Staff by OI without investigation (see E.3., above) will be handled by the staff as part of its normal process to resolve inspection findings. This may include additional inspections, written requests for information from the licensee, meetings between the staff and licensee or proceeding with enforcement action as appropriate on the basis of the original or supplemented inspection findings or such other actions as appropriate. If, after development of supplemental information or reassessment of the original findings the matter warrants categorization as a high priority, the matter may be referred to OI again for investigation in accordance with the procedures in this chapter.

G. Commission Notification Requirement for Certain OI Referrals

When the staff concludes that a material false statement has been made to the NRC by a senior level official of an NRC applicant or licensee and when the criteria for OI referral are met, in addition to preparing a request for investigation by OI, staff will also prepare a memorandum from the EDO to the Commission providing the background and the basis for the staff's conclusion.

LIMITED DISTRIBUTION -- NOT FOR PUBLIC DISCLOSURE

Request No. ________

Region/Office-year-No.)

Allegation No. _____

TO:

FROM:

REQUEST FOR INVESTIGATION

Licensee/Vendor/Applicant	Docket No.
Facility or Site Location	
Regional Administrator/Office	Date

A. Request

What is the matter that is being requested for investigation (be as specific as possible regarding the underlying incident).

LIMITED DISTRIBUTION -- NOT FOR PUBLIC DISCLOSURE W/O OI APPROVAL

LIMITED DISTRIBUTION -- NOT FOR PUBLIC DISCLOSURE

B. Purpose of Investigation

1. What is the basis for the belief that the violation of a regulatory requirement is more likely to have been intentional or to have resulted from careless disregard or reckless indifference than from error or oversight? (be as specific as possible).

2. What are the potential regulatory requirements that may have been violated?

3. If no violation is suspected, what is the specific regulatory concern?

4. Why is an investigation needed for regulatory action and what is the regulatory impact of this matter, if true?

C. Requester's Priority

1. Is the priority of the investigation high, normal, or low? _____

2. What is the estimated date when the results of the investigation are needed? ____________

3. What is the basis for the date and the impact of not meeting this date? (For example, is there an immediate safety issue that must be addressed or are the results necessary to resolve any ongoing regulatory issue and if so, what actions are dependent on the outcome of the investigation?)

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D. Contact

1. Staff members:

2. Allegers identification with address and telephone number if not confidential. (Indicate if any confidential sources are involved and who may be contacted for the identifying details.)

F. Other Relevant Information

Signature

cc: OI */
EDO
NRR/NMSS/OSP as appropriate */
OGC
Regional Administrator **/
OE

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*/ If generated by region.
**/ If generated by NRR/NMSS/OSP

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Remarks of Commissioner Frederick M. Bernthal
U.S. Nuclear Regulatory Commission
before the
Subcommittee on Nuclear Regulation
Senate Committee on Environment and Public Works

October 8, 1987

From the outset, I have held a perspective different from that of my colleagues on the issues of a statutory inspector general for the NRC and the designation of the Commission's Office of Investigations as a statutory entity reporting to the Commission. And I am pleased that the Commission now apparently no longer raises strong objections to the establishment of an Inspector General for the NRC.

I too remain unconvinced that an impartial examination of the record suggests a compelling need for a statutory inspector general at the NRC. But while it may not be strictly necessary, a statutory IG would relieve the Commission of a burden that it can nicely do without. Three times now, under two different heads of the Office of Inspector and Auditor since I became a member of the Commission, I have seen inordinate diversion of Commission time and attention to deal with assertions that OIA has not done its job properly.

Therefore, if the Congress feels strongly that such an office would permit the Commission to carry out its statutory responsibilities more efficiently, I do not now and never have objected to such a change. The Congress is welcome to assume the burden of oversight responsibility for an NRC Inspector General.

With regard to the Office of Investigations, if as Senator Glenn earlier represented at a hearing on this issue chaired by him, consistent with the original version of S.908, the sole purpose in designating OI as a statutory office would simply be to preserve the status quo in which OI reports to the Commission and is under the general supervision of the Commission, I have no difficulty whatsoever with that proposition.

The only practical effect of such legislation would be to prevent the Commission from ever requiring the head of the Office of Investigations to report to the EDO. Since I have never supported such a change, and since it is now clear that the Commission is highly unlikely in the foreseeable future to attempt such a change, and since there seems to be little disagreement on the need for an Office of Investigations, I find no reasonable basis for Commission objection.

But the provisions of S.908, as amended and reported out by the Committee on Governmental Affairs, would now cast OI within the office of a statutory Inspector General, and I completely agree with the continued unanimous opposition of the Commission to such a provision.

The Committee should also note, however, that even the original version of S.908, to provide a statutory basis for the status quo with respect to OI, suffered from internal inconsistencies. On the one hand, the Director of OI would have been required to report to and be under the general supervision of the Commission; on the other hand, the Commission categorically could not prevent or prohibit the Director of OI from initiating, carrying out, or completing any investigation.

This language could be read as denying the Commission its authority to set broad priorities for the use of the investigative resources of the Agency, and to apply those resources to matters having the highest priority for the Commission's public health and safety responsibilities. To the extent that the language could be so interpreted, I believe such legislation by the Congress would be inappropriate, unwise, and could create an entity clearly responsible to no one.

It bears emphasis that, despite all the rhetoric we have heard on this subject in recent months, I do not know of a single instance in which the Commission has prevented the Office of Investigations from initiating, carrying out, or completing any investigation which the Director of that office has recommended be pursued, and I believe the Commission would do so only in the most extraordinary circumstances.

It is important to set the record straight on the meaning of the term "independence" where the Office of Investigations is concerned. OI should and does have all the independence necessary to carry out its responsibilities as the investigatory arm of the Commission. OI should and does have complete freedom from interference by the Staff or Commission in carrying out any investigation which is necessary to satisfy the regulatory or enforcement needs of this agency. But "independence" should not mean that as an organization, OI is divorced from the Staff or the Commission. That would endow OI with a character more akin to a mini-FBI than to an agent of the Commission.

It is essential that the Staff be carefully consulted on decisions regarding which investigations are important for regulatory and enforcement purposes and which are not. For its part, the Commission must be free to determine broad agency policy, to supervise management, and to set management priorities for the use of limited agency resources. And it is the responsibility of the Director of OI to provide the Commission the very best advice in his or her area of expertise, as should every agency office director. But the buck should and does stop with the Commission.

It is indeed unfortunate that as an indirect consequence of what I believed at the outset to have been an unwise and untenable position taken by the Commission majority on the specific legislative proposals at issue -- establishment of an independent inspector general, and confirming in statute the Office of Investigations as currently constituted -- the Commission has found itself further embroiled in needless controversy. Much of this has occurred because of ill-considered (indeed almost unconsidered) Commission opposition to these two straightforward proposals that, for the reasons I have noted, would be of minimal practical consequence for the day-to-day operation of the Commission.

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STATEMENT

OF

VICTORIA TOENSING
DEPUTY ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

BEFORE

THE

SUBCOMMITTEE ON NUCLEAR REGULATION
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE

CONCERNING

THE INVESTIGATIVE FUNCTIONS AND
RESPONSIBILITIES OF THE UNITED STATES
NUCLEAR REGULATORY COMMISSION

ON

OCTOBER 8, 1987

Mr. Chairman and members of the Committee, my name is Victoria Toensing. I am a Deputy Assistant Attorney General in the Criminal Division of the Department of Justice. I am pleased to be here today to discuss with you the investigative functions and responsibilities of the United States Nuclear Regulatory Commission.

In addressing this issue, I would like to focus upon the roles of the Department and the Commission in criminal matters affecting the nuclear industry. As a Deputy Assistant Attorney General, one of my responsibilities is to oversee criminal case referrals from the Nuclear Regulatory Commission. At the outset, let me assure you that we in the Department of Justice consider our criminal law enforcement responsibilities in this area to be a matter of great importance. In our view the stakes for the public and the nation are simply too great to allow wrongdoing in this industry to go unpunished.

In performing this vitally important task the Department of Justice must work closely with the NRC. The NRC and the Department of Justice play complementary roles in this field. As the governmental agency with primary responsibility for regulation of nuclear power the NRC sets the technical standards for this industry. It is then incumbent upon the NRC to use its technical expertise to police this industry through its civil enforcement program. The NRC accomplishes this regulatory function through a combination of industry self-reporting, routine inspections, and, where warranted, administrative investigations. To perform these investigations the Commission has established an Office of Investigations, which contains a cadre of experienced investigators who are accustomed to working with nuclear power issues.

While the vigilance of the NRC must remain the principal means by which the public health and safety are protected, there is an important contribution which the Department of Justice can make to this field. Like all human activities, the nuclear industry may include those who would ignore the rule of law and engage in criminal misconduct. When such misconduct occurs, it is the duty of the Department of Justice to prosecute those responsible, not only to punish them but also to deter others. We believe that the extra measure of deterrence provided by criminal processes constitutes an integral part of the regulatory process and we are committed to providing this extra measure of deterrence through effective criminal investigation in the nuclear field.

Given the complementary roles which the NRC and the Department of Justice play in this area, it is vitally important that our two agencies work closely together. While the Department of Justice has at times in the past experienced difficulties in coordinating its criminal enforcement efforts with the NRC, we have recently noted improvement. It is our hope that our relationship with the NRC will continue to improve and that our two agencies will be able to fulfill their complementary missions in a highly effective coordinated manner.

While we believe that we have made significant progress in this field, we recognize that there is more which needs to be accomplished. At the outset, we believe that the challenges confronting our two agencies present administrative questions. Ultimately, resolution of these administrative questions will turn on three factors: (1) the existence of open communication between the NRC and the Department; (2) the exercise of sound judgment by officials in both agencies, judgment tempered by an appreciation of our respective roles in enforcing the law and ensuring public health and safety; and (3) the creation of basic guidelines to govern the referral process.

We believe that the first two of these factors currently exist. Over the past year we have engaged in frank and constructive discussions with our counterparts at the NRC in an effort to improve the way in which both agencies perform their roles in this field. As a result of these discussions we believe that officials in both agencies have a fuller appreciation of each others needs. This fuller appreciation is reflected in the advisory role which the Department played during the drafting of the NRC's material false statement regulation. It is also illustrated by the efforts which the NRC has made to advise us of civil matters which might affect our ongoing criminal investigations. On several occasions the NRC alerted us in advance concerning its civil enforcement actions to protect the public health and safety so that the potential damage to any criminal investigation could be minimized or avoided entirely.

Thus, on the administrative level, all that remains is for our two agencies to establish procedures for the referral and coordination of cases. Currently, many issues which arise in NRC case referrals are resolved on an ad hoc basis. We recognize the need for some basic guidelines in this field and are currently engaged in negotiations with the NRC aimed at reaching a memorandum of understanding between our two agencies. This memorandum of understanding would clarify the respective responsibilities of the Department and the NRC in the criminal referral process and define procedures which would permit the NRC to meet its public health and safety obligations without undue harm to the criminal justice process. We are committed to developing such a memorandum of understanding and are hopeful our negotiations will soon produce substantial results.

Although the actions we are taking can contribute significantly to effective law enforcement, they do not constitute a total solution. Our experience with the NRC has identified two areas of particular concern. The first of these areas involves the need to strengthen the criminal investigative authority of the NRC.

Historically, NRC case referrals have involved complex, technical issues. Typically, these referrals present not only questions of criminality, but difficult issues of physics and engineering as well. In a field as complex as the nuclear power industry, the special expertise of investigators, like those from the NRC's Office of Investigations, is essential to a successful criminal investigation and prosecution. The Atomic Energy Act is not free from ambiguity on the issue of criminal investigative authority. Currently, as a general rule, the Office of Investigations conducts only civil investigations. Therefore, we receive criminal investigative assistance from that office only when we make a formal request for it as part of our criminal investigation in a particular case. When we make such a request, the ability of that office to continue its civil investigation may be curtailed.

A second, related concern involves the investigative independence of the NRC"s Office of Investigations. We understand that the NRC's current practice is that the Office of Investigations retains full authority to refer matters to the Department of Justice, absent a Commission vote to the contrary. While we are generally satisfied with this practice, we believe that every step should be taken to ensure the continued independence of this investigative office.

We believe that both of these two concerns are amenable to a legislative solution. In this regard, we understand the Committee is considering legislation which would establish for the first time a statutory Inspector General within the NRC.

We agree as to the desirability of an independent investigative component within the NRC but note that creation of a statutory Inspector General is not the only method for achieving this result. The Office of Professional Responsibility within the Department of Justice, for example, is widely respected as an independent investigative and prosecutive unit which functions so professionally that any effort to legislate its role might be more likely to hinder rather than enhance its performance. In short, there are other models besides that of the statutory Inspector General to which the Committee may wish to look in providing for an independent investigative unit within the NRC. These other models can satisfy our fundamental interest, which is to ensure that allegations of criminal misconduct are promptly investigated and referred to the Department of Justice.

The Subcommittee may also desire to consider legislation to clarify the existing ambiguity concerning the authority of the NRC to conduct criminal investigations. The statute should expressly state that the NRC has authority, concurrent with the Federal Bureau of Investigation, to conduct criminal investigations into violations of its statute and regulations by any persons or entities. On this issue of clarifying NRC authority to conduct criminal investigations, we do not intend to convert the NRC into a criminal investigative agency. Rather, its focus should continue to be primarily upon safety. To the extent that the Office of Investigations within the NRC detects criminal wrongdoing, however, and reports such matters to the Department of Justice, there should be no question as to the authority of the Office of Investigations to assist the Department of Justice in the investigation of such matters. Again, the highly technical nature of nuclear operations often makes it essential to have the benefit of NRC expertise to carry out a proper criminal investigation.

Moreover, we believe that any amendment to the Atomic Energy Act should clarify the authority of the NRC to impose civil penalties against individual wrongdoers who are not NRC licensees. There is some question as to whether the NRC currently has the legal authority to impose civil penalties against individuals who, although not licensees, may have caused regulatory violations by licensees. If civil penalties may only be imposed upon corporate licensees, there is no sanction, short of criminal prosecution, available to deter wrongdoing by individuals. We believe that civil penalties levied against individuals might, in appropriate cases, be a proper substitute for criminal prosecution and would provide a more effective continuum of deterrence. We recognize that the NRC is currently studying the desirability of such an expansion of civil penalty authority and will be interested in the results of that review. In our view, however, such an expansion would promote increased deterrence and would thus be in the public interest. We would be happy to work with the Subcommittee and the Commission to achieve these ends.

In concluding let me state, once again, that the Department of Justice is committed to effective law enforcement in this vitally important area. As part of this commitment the Department and the NRC have made substantial strides to improve the ability of our agencies to investigate and prosecute wrongdoing by nuclear licensees. We fully intend to continue with these efforts. However, we also believe that appropriate legislation, amended as we propose, could promote our efforts.

Mr. Chairman, this, along with the written responses which I have provided to the specific questions submitted by the Subcommittee, concludes my prepared statement. I should be please to respond to any questions you may have.

RESPONSES TO QUESTIONS FOR THE ATTORNEY GENERAL FROM SENATOR JOHN BREAUX, CHAIRMAN, UNITED STATES SENATE, COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS, SUBCOMMITTEE ON NUCLEAR REGULATION

1. Please provide your views on the proper role and function of investigative activities regarding licensee misconduct as a part of the regulatory process and, specifically, as a means of advancing the Commission's ability to carry out its statutory mandate to protect the public health and safety. Is the investigative function a key and integral part of an effective regulatory process?

RESPONSE: We believe that the Department of Justice and the NRC must play complementary roles in the nuclear power field. Of course, as the governmental agency with primary regulatory responsibility in this field, the NRC must take the lead. It is the NRC which sets the technical standards for the nuclear industry. Moreover, it is incumbent upon the NRC to use its technical expertise to police this industry through its civil enforcement program and ensure that nuclear facilities are safely built and operated.

While the vigilance of the NRC remains the principal means by which the public health and safety are protected, there is an important contribution which the Department of Justice can make to this field. Like all human activities, the nuclear power industry may contain those who would ignore the rule of law and engage in criminal misconduct. When such misconduct occurs it is the duty of the Department of Justice to prosecute those responsible, not only to punish them but also to deter others. To the extent that criminal investigations provide an extra measure of deterrence, we believe that these investigations constitute an integral part of the regulatory process. We, of course, are fully committed to providing this extra measure of deterrence through effective criminal investigation in the nuclear field.

2. Please comment on the Commission's existing organization and structure for the conduct of investigations involving licensee misconduct. Is this function organized and structured in a manner that, in your view, enables the Commission to carry out its statutory mandate in an effective way? Comment specifically on the following issues:
   a. Is the Department satisfied with the actions taken by the Commission to ensure the independence of the Office of Investigations?

RESPONSE: We are generally satisfied with the actions which the Commission has taken to ensure the independence of the NRC's Office of Investigation. As you may know, in 1985 the Commission considered a proposal which would have changed the status of the NRC's Office of Investigations. The proposal which was then under consideration would have shifted the Office of Investigations from its current position as a Commission level office to a staff office. One consequence of this proposed shift would have been that the Office of Investigations would report to the NRC's Executive Director for Operations, instead of reporting directly to the Commission itself.

Because we believed that this change in the status of the Office of Investigations might affect its investigative independence, we wrote to then Chairman Palladino on March 18, 1985 to express our concerns regarding this proposal. Following this exchange of correspondence the NRC decided to retain the Office of Investigations as a Commission level office which reports directly to the Commission itself. This decision by the NRC to retain the independence of this office fully satisfied the concerns expressed by the Department in its March 18, 1985 letter to Chairman Palladino.

We continue to believe that all reasonable steps must be taken to preserve the investigative independence of the Office of Investigations (OI). In this regard, we are concerned that the recent creation within the NRC of an Investigation Review Board (IRB) may limit the independence of this office, by screening the matters which are referred to OI for its consideration. There may be instances where a referral from the IRB to OI is not needed for civil regulatory purposes but criminal investigation is still warranted. In such instances, IRB action could conceivably affect the criminal referral process. We believe that every effort should be made to ensure the OI retains full freedom to initiate investigations and receive allegations of misconduct.

b. Is the Department satisfied with the Commission's current procedures for the referral of cases involving licensees misconduct to the Department? Is the Department satisfied with the ability of the Office of Investigations to refer matters to the Department that warrant investigation, and to do so in a timely manner? Please identify any instances where the Commission has refused to refer a meritorious case to the Department for consideration. Please identify any instances where a Department criminal investigation or prosecution was compromised or damaged by actions taken by the Commission with regard to the referral of such case.

RESPONSES: It is our understanding that, absent a vote by the Commission to the contrary, the Director of the NRC's Office of Investigations currently retains the authority to refer any matter which he deems appropriate to the Department of

Justice for its consideration. Moreover, to our knowledge this referral policy has not affected the prompt referral of matters to the Department of Justice. Furthermore, we are unaware of any instance in which the Commission has refused to refer a meritorious case to the Department for consideration.

We recognize, however, that our two agencies can improve on our referral procedures. Accordingly, we have engaged in discussions with NRC officials, discussions which are aimed at developing a memorandum of understanding between the Department and the NRC. We are fully committed to achieving such a memorandum of understanding and are hopeful that our efforts will soon result in improved referral procedures.

c. Is the Department satisfied with the Commission's current procedures for communicating in advance with the Department on possible civil enforcement actions to protect the public health and safety so as to minimize or avoid potential damage to any Department criminal investigation?

RESPONSE: The question of coordination of NRC civil enforcement actions with the Department's criminal investigations is perhaps the most important issue which we confront in this area. Ultimately, resolution of this issue will require the following three conditions: open communication between the NRC and the Department; the exercise of sound judgment by both agencies; and the establishment of some basic guidelines which will accommodate the interests of our two agencies in a fair way.

We believe that the first two of these conditions may already exist. We have established excellent communications with our counterparts at the NRC and we believe that the Commission has generally promptly notified us of civil enforcement actions which may affect our ongoing investigations. Moreover, in reconciling the competing civil and criminal enforcement demands, we believe that NRC officials have shown sensitivity to the needs of the Department of Justice.

Thus, generally all that remains is for our two agencies to establish procedures for the referral and coordination of cases. To date, we have not yet agreed upon basic guidelines to govern the referral process in NRC cases. Therefore, questions of coordination in these cases continue to be resolved on an ad hoc basis. However, we are currently engaged in discussions with the NRC aimed at reaching a memorandum of understanding between our two agencies. This memorandum of understanding would clarify the respective responsibilities of the Department and the NRC in the criminal referral process and define procedures which would permit the NRC to meet its public health and safety obligations without undue harm to the criminal justice process. We are committed to developing such a memorandum of understanding and are hopeful that our negotiations will soon produce substantial results.

d. Is the Department satisfied with the Commission's current approach to material false statements made by Commission licensees?

RESPONSE: We are generally satisfied with the Commission's current administrative approach to material false statements made by NRC licensees. Indeed, the development of the NRC's present position regarding material false statements demonstrates how the Department of Justice and the NRC can work together to promote law enforcement in this field. As you may know, in the Fall of 1986 the NRC provided its proposed material false statement regulation to the Department of Justice for our comment. On December 18, 1986 Deputy Assistant Attorney General Victoria Toensing provided the Commission with the Department's views regarding this proposed regulation.

In her December 18, 1986 letter to the NRC Deputy Assistant Attorney General Victoria Toensing discussed three concerns relating to a proposed NRC material false statement regulation. The most significant of these concerns involved the NRC's efforts to define for the first time in its regulations the term "material false statement." Because the NRC's proposed definition differed significantly from the definition of material false statement used in connection with criminal prosecutions under 18 U.S.C. §1001, we expressed concern that enactment of that section of the regulation might create confusion and hinder effective criminal prosecution of false statement cases. Accordingly, we suggested that this definition was unnecessary and recommended that it be deleted entirely from the regulation.

We are satisfied with the NRC's response to this suggestion. Following this exchange of correspondence the NRC agreed to delete completely this definition of material false statements from its regulation. By taking this action the Commission has avoided a potentially troubling issue in criminal cases and has enhanced our ability to effectively prosecute misconduct by NRC licensees.

In her December 18, 1986 letter Deputy Assistant Attorney General Toensing raised two issues of lesser significance with the NRC. First, Ms. Toensing suggested that the NRC reconsider its current civil penalty policy. Under this policy the Commission typically does not penalize individuals, but rather, only penalizes corporate licensees.

In our correspondence we suggested that civil penalties levied against individuals might have a greater deterrent effect.

The NRC responded to this suggestion by advising us that it may not have the legal authority to impose civil penalties against individuals who are not NRC licensees. Nonetheless, the staff indicated that it would study this legal issue and determine whether it could recommend a broader civil penalty policy to the Commission. We understand that this question is still under review.

Finally in her December 18, 1986 letter Ms. Toensing discussed a residual reporting requirement which the NRC had proposed. Existing NRC regulations impose specific reporting requirements on licensees. In addition to these specific reporting obligations, the NRC's proposed regulation would have required licensees to report "information identified by the applicant or licensee as having for the regulated activity a significant implication for public health and safety or common defense and security." This provision would have established a subjective standard for this reporting requirement. Thus, the licensee's judgment would control in determining whether information met the threshold for reporting established by this regulation. In our letter to the Commission, we suggested that an objective standard be substituted for this wholly subjective test. Thus, we recommended that this residual reporting requirement be extended to all incidents which are "reasonably identifiable" as having significant public health and safety implications.

The NRC declined to follow our suggestion and retained a subjective standard for this residual reporting requirement. It is our understanding that nuclear licensees are already specifically required by Commission regulations to make reports to the NRC in a wide variety of instances. Any willful violation of these specific reporting requirements would provide an independent basis for criminal prosecution. We have been told that the residual reporting requirement which the NRC recently adopted will come into play in only those very few instances where the Commission staff had not anticipated the need for a specific reporting requirement.

e. Is the Department satisfied with the willingness of the Commission to provide criminal investigative assistance upon the Department's request? Are there any instances where the Commission has declined a Department request for such assistance?

RESPONSE: We are satisfied with the willingness of the Commission to provide investigative assistance to the Department in criminal matters. To date, the Commission has never refused a Department request for such assistance. Moreover, in every instance the Commission has provided sufficient investigative support to allow us to successfully conclude our investigation.

3. Have you detected a pattern of opposition or resistance by or within the Commission to the detection and disclosure of deliberate wrongdoing by Commission licensees? If so, please explain.

RESPONSE: While the Department of Justice has in the past experienced some difficulties working with the NRC in criminal cases, we regard these as isolated, historic incidents which do not reflect our current relationship with that agency. That relationship has improved significantly and we trust that it will continue to improve as our two agencies develop an increased awareness of the need for close coordination in this field. We are committed to improving this relationship and over the past year have had extensive discussions with the NRC in an effort to identify and eliminate potential problem areas. In our recent dealings with this agency, we have encountered no indication of concerted opposition to the detection of deliberate wrongdoing by NRC licensees.

4. Please summarize the resources and authorities available to the Department to investigate criminal wrongdoing by Commission licensees.

RESPONSE: In our referrals from the NRC the Department of Justice relies upon two principal resources. First, the Department may turn to the Federal Bureau of Investigation to investigate alleged wrongdoing by NRC licensees. The FBI is specifically authorized by the Atomic Energy Act to conduct such investigations. See 42 U.S.C. §2271(b).

However, historically NRC case referrals involve complex, technical issues. Typically, these referrals present not only questions of criminality, but also difficult issues of physics and engineering. In a field as complex as the nuclear power industry, the special expertise of investigators, like those from the NRC's Office of Investigations, is often essential to a successful criminal investigation and prosecution. For this reason we have on numerous occasions sought the investigative assistance of the NRC's Office of Investigations in criminal matters. While the Commission has freely granted our requests for this assistance, these requests raise several legal questions. The Atomic Energy Act is not free from ambiguity on the issue of criminal investigative authority. Currently, as a general rule, the Office of Investigations only conducts civil investigations. Therefore, we receive criminal investigative assistance from that office only when we make a formal request for it as part of our criminal investigation in a particular case. When we make such a request, the ability of that office to continue its civil investigation may be curtailed.

5. Please provide your views on S.908. Do you support the establishment of an Inspector General for the Commission who would be responsible for investigating misconduct by Commission licensees?

RESPONSE: As we have stated in the April 9, 1987 testimony of Deputy Assistant Attorney General Victoria Toensing before the United States Senate Governmental Affairs Committee, the Department's fundamental interest is to ensure that allegations of criminal misconduct are promptly investigated and referred to the Department of Justice. We believe that the creation of an independent investigative component within the NRC may promote this interest. However, we note that the creation of a statutory Inspector General is not the only method for achieving this type of investigative independence. Therefore, Congress may wish to look to other models besides a statutory Inspector General when providing for an independent investigative unit within the NRC.

PREPARED TESTIMONY

SUBMITTED BY

UNITED STATES REGULATORY COMMISSION

TO

SUBCOMMITTEE ON NUCLEAR REGULATION

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

UNITED SATES SENATE

CONCERNING

THE OFFICE OF INVESTIGATIONS

PRESENTED BY

VICTOR STELLO, JR.

EXECUTIVE DIRECTOR FOR OPERATIONS

SUBMITTED: OCTOBER 8, 1987

Mr. Chairman, Members of the Subcommittee, I am pleased to appear before you to provide my views on the investigation function of the Commission. This is an important issue because the Commission, in order to perform its statutory responsibilities to protect the public health and safety and common defense and security, must have an effective means to obtain information concerning safety of licensed activities.

My testimony today will address the two questions asked of me. First, is the investigative function a key and integral part of an effective regulatory process? Second, is the investigative function organized and structured in a manner that enables the Commission to carry out its statutory mandate in an effective way? The short answer to both questions is yes.

The investigations which are the subject of this hearing involve investigations of activities of the Commission's licensees and their contractors. These investigations are conducted by the Office of Investigations (OI). Investigations of NRC employees and contractors are conducted by the Commission's Office of Inspector and Auditor (OIA). OIA focuses primarily on fraud, waste, and mismanagement. If OIA develops information indicating a potential safety issue the matter is provided to the staff for appropriate regulatory action and to OI if potential wrongdoing is involved. Similarly, the staff regularly refers matters to OIA for their investigation. The activities of OIA are the subject of another hearing, this afternoon.

The investigation function is a key and integral part of an effective regulatory process. In carrying out its mission the Commission obtains information from a variety of sources. Much of the information that is considered in reaching regulatory decisions is obtained directly from licensees and applicants. Another important source of information is developed by the NRC through inspection and investigation efforts such as observations of equipment, processes, and operations, review of records, discussions, meetings, and interviews with employees and managers of licensees and their contractors.

The primary purpose of what we in the NRC call "inspections" is the identification of safety issues so that appropriate actions can be taken to resolve them. The information gathering activities of inspectors are focused on whether licensed activities are being conducted safely and involve technical issues and compliance with Commission requirements. Inspectors' training, experience, and knowledge is primarily technical in nature.

The purpose of what we call "investigations" conducted by the Office of Investigations is to support Commission and staff safety decisions including both licensing and enforcement. This is done primarily by investigating matters involving potential wrongdoing, i.e., violations which appear to be more likely to have been willful rather than caused by error or oversight. In addition to investigating wrongdoing, OI investigators, because of their investigatory skills, frequently provide an important resource to assist the staff in conducting inspections where it is necessary to obtain information from individuals to make safety decisions.

While most violations committed by licensees are resolved by the inspection process, those that may involve wrongdoing are coordinated with and normally investigated by the OI investigators. Investigators do not normally have technical skills. Rather they possess the necessary investigative skills to develop information in a disciplined manner through interviews with individuals, review of records, and other investigative techniques. These investigative skills complement the technical skills of the inspectors.

Matters involving potential wrongdoing are significant regulatory issues. This is because a violation where wrongdoing is found raises questions of integrity which strikes at the foundation of the regulatory process. Given the limited resources of the Commission, our regulatory program is dependent on licensees and their employees carrying out regulatory activities in good faith and communicating with complete candor to the Commission. While no violation is acceptable and all must be promptly corrected, violations involving wrongdoing cannot be tolerated. In response to findings of wrongdoing, significant enforcement action is taken which may be civil, criminal, or both. Thus, the ability to resolve questions of potential wrongdoing and to obtain a sufficient evidentiary basis to take the appropriate regulatory action is necessary to an effective regulatory program.

In sum, my response to the first question is that it is clear that an investigative function focusing on obtaining information to make regulatory decisions is a key and integral part of an effective regulatory process.

The second question is whether the current organization and structure of the investigation function enables the Commission to carry out its statutory mission in an effective way. In responding to this question let me state at the beginning that there are several ways that an investigatory function could be structured and organized within the Commission. Dedicated management and staff can make most any organization work effectively to serve the mission, independent of organizational structure.

Inspectors and investigators, while they possess different skills and may utilize different processes, both exist for the sole purpose of fulfilling our regulatory function. That is, they are gathering facts to provide safety information to regulatory decision makers. Because of the nature of regulated activities, frequently our technical staff including inspectors are assigned to investigators to assist them in their investigations. As I stated earlier, at times the investigators complement the inspection process by assisting inspectors. Both inspections and investigations must be conducted by professionals with sufficient independence and skills to do a thorough job to produce the necessary information for sound decision making. At the same time, given the variety of activities regulated by the Commission with varying potential hazards to the public, management decisions must be made to assure the limited inspection and investigatory resources are focused on the most important safety issues.

Given the staff's technical resources and that it is in almost every case the end user within the NRC of the results of an inspection or investigation, it would not be inappropriate for the staff to manage both the inspection and investigation process. Obviously, I am aware of the past failings, actual or perceived, when the staff was responsible for the investigation program.

Since that time the staff's sensitivity to potential wrongdoing and the need for thorough investigations have substantially increased. Moreover, the staff is charged with the important responsibility to not only assure that licensees are safely carrying out licensed activities but also to modify, suspend, and revoke licenses when the staff no longer has reasonable assurance that activities can be safely carried out. I believe the staff is capable of managing both the inspection and investigation efforts.

On the other hand, the existing structure with the investigators reporting directly to the Commission is in most cases working effectively. In reality the bulk of the investigations conducted to date have been done effectively and with a cooperative spirit. I did state to the Senate Committee on Governmental Affairs on April 28,1987 that the relationship between the OI and the staff had not been working well together and that "Those relationships must improve." I also stated that concentrating on this issue can have a tendency to exaggerate its significance. We in the NRC are aware of the problem and are committed to its resolution. In fact we have and are continuing to improve our relationships and to focus jointly our resources on the safety mission.

In this regard, we have established an Investigation Priority Review Group to consider the priorities for investigations of wrongdoing on a national basis. This group was developed with the cooperation of the Office of Investigations whose Director will be a member along with senior management of the staff. The mission of this group is to periodically review the priorities and schedules of investigations to assure that the investigatory resources are focused on the most important safety issues. This agency wide effort should go a long way to further improving relationships.

In day-to-day dealings the staff and OI are working closely and effectively on cases. Safety information is being developed. Frequently, even before investigations are finished, the staff and OI are working together and necessary regulatory action is being taken. In this past year there have been outstanding examples such as investigations related to Peach Bottom, Finley Testing Lab, Log-Tec, VA Hines Hospital, Advanced Medical, US Testing, A1 Inspection, Wright Patterson Air Force Base, Radiation Technology, Oyster Creek, TMI, and Turkey Point where the Staff and OI are effectively carrying out the safety mission of the agency.

This is not to say that the staff at times does not have frustrations with the investigation process. Once wrongdoing is identified, the staff normally desires to go forward with the appropriate regulatory action. Such action might include suspension or modification of the license in order to remove the wrongdoer's ability to impact the public health and safety. If the wrongdoer has been already effectively removed by the licensee, an order may still be appropriate as well as a significant civil penalty to emphasize to licensees the need to scrutinize their operations to avoid similar problems in the future. However, if wrongdoing is found, the matter may be provided to the Department of Justice for their prosecutional review. Their review understandably takes time to perform. This results in delay of NRC action because, except for cases requiring immediate action, NRC holds its cases in abeyance to avoid any potential impact on a DOJ action. Nevertheless, the staff recognizes both the value of a criminal action in deterring future violations and that inherently, the criminal process takes time to determine whether to prosecute and to develop the criminal case. In this regard, NRC and DOJ are in the process of developing a Memorandum of Understanding to maximize the ability of each agency to meet its statutory mission.

In sum the current investigation function is enabling the Commission to carry out its mission effectively. However, any action to cause further isolation and independence of the investigation function from the regulatory staff would, in my view, detract from the agency's mission.

Mr. Chairman, that concludes my testimony. I appreciate this opportunity to appear before the Subcommittee today and I am ready to answer any questions that you might have.

PREPARED STATEMENT

BY

BEN B. HAYES, DIRECTOR
OFFICE OF INVESTIGATIONS
U.S. NUCLEAR REGULATORY COMMISSION

BEFORE THE

SUBCOMMITTEE ON NUCLEAR REGULATION
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE

CONCERNING THE
OFFICE OF INVESTIGATIONS
U.S. NUCLEAR REGULATORY COMMISSION

SUBMITTED: OCTOBER 8, 1987

IN YOUR SEPTEMBER 29, 1987 LETTER INVITING ME TO TESTIFY BEFORE THE SUBCOMMITTEE ON NUCLEAR REGULATION, YOU DESCRIBED A SERIES OF ISSUES OF PARTICULAR INTEREST TO THE SUBCOMMITTEE AND ASKED THAT I BE PREPARED TO DISCUSS THEM AT THE OCTOBER 8 HEARING. THE FOLLOWING TESTIMONY RESPONDS TO THOSE ISSUES.

THE NRC CARRIES OUT ITS STATUTORY MANDATE TO PROTECT THE PUBLIC HEALTH AND SAFETY PRIMARILY BY MEANS OF A REGULATORY PROGRAM CONSISTING OF THE PROMULGATION OF REQUIREMENTS COUPLED WITH AN AGGRESSIVE AND EFFECTIVE INSPECTION AND ENFORCEMENT PROGRAM. AS THE NUCLEAR INDUSTRY IS COMPRISED LARGELY OF PERSONS OF GOOD WILL AND SOUND CHARACTER WHO SHARE THE NRC'S COMMITMENT TO PROTECT THE PUBLIC HEALTH AND SAFETY, THIS IS A GENERALLY EFFECTIVE AND RATIONAL REGULATORY PROCESS.

ON THE OTHER HAND, LIKE ANY OTHER INDUSTRY, THERE ARE WITHIN THE NUCLEAR INDUSTRY A SMALL PERCENTAGE OF INDIVIDUALS WHO MAY, FOR A VARIETY OF REASONS, WILLFULLY VIOLATE NRC SAFETY REQUIREMENTS. SUCH WILLFUL VIOLATIONS CONSTITUTE WRONGDOING, AND THUS FALL WITHIN THE INVESTIGATIVE JURISDICTION OF OI.

AS THE NRC REGULATORY PROCESS, PARTICULARLY THE INSPECTION PROGRAM, IS GEARED TO THE DETECTION OF NONCOMPLIANCE THAT IS INADVERTENT, I.E., THAT CAUSED BY MISTAKE, INATTENTIVENESS, OR EVEN CARELESSNESS, IT IS PARTICULARLY VULNERABLE TO DELIBERATE VIOLATIONS OF NRC REQUIREMENTS. THIS IS ESPECIALLY SO WHEN

PERSONS COMMITTING THE VIOLATION ATTEMPT TO CONCEAL IT BY MEANS OF RECORDS FALSIFICATION, FRAUDULENT TESTIMONY, OR INTIMIDATION OF EMPLOYEES KNOWLEDGEABLE OF THE OFFENSE. HISTORICALLY, DETECTION OF WILLFUL NONCOMPLIANCE BY THE ROUTINE INSPECTION PROGRAM HAS BEEN DIFFICULT, AND THUS INFREQUENT. THUS, THE INTEGRITY OF NRC PROGRAMS AND OPERATIONS IS DIRECTLY AFFECTED BY SUCH WRONGDOING. THE NRC ITSELF BECOMES A "VICTIM" OF THIS WRONGDOING AS SUCH VIOLATIONS ERODE THE EFFECTIVENESS OF THE REGULATORY PROCESS

PRIOR TO THE ESTABLISHMENT OF OI, THE NRC DID NOT HAVE AN EFFECTIVE MECHANISM FOR DEALING WITH WRONGDOING. WRONGDOING IS DIFFICULT TO DETECT. THE NRC PRIMARILY LEARNS OF IT THROUGH THE RECEIPT OF ALLEGATIONS. RESOLUTION OF ALLEGATIONS IN THE PAST, HOWEVER, WAS OFTEN LEFT TO TECHNICAL PERSONNEL WITH LITTLE IF ANY INVESTIGATIVE EXPERIENCE. MOREOVER, AS SUCH NRC PERSONNEL WERE NORMALLY SUBORDINATE TO STAFF MANAGERS WHO HAD RESPONSIBILITY FOR THE ROUTINE REGULATORY PROGRAM, THEY WERE PERCEIVED BY SOME OBSERVERS AS LACKING THE OBJECTIVITY AND DETACHMENT NECESSARY TO RESOLVE ALLEGATIONS FULLY AND EFFECTIVELY. IT WAS AGAINST THIS BACKDROP THAT CONGRESSIONAL PRESSURE LED TO THE ESTABLISHMENT OF OI.

OI WAS CONFIGURED FROM THE OUTSET TO DEAL WITH THE TWO SHORTCOMINGS DESCRIBED ABOVE. THE OFFICE WAS STAFFED WITH SEASONED INVESTIGATORS ALMOST ALL OF WHOM HAD FIVE YEARS OR MORE FEDERAL CRIMINAL INVESTIGATIVE EXPERIENCE. IN ORDER TO PRESERVE BOTH THE APPEARANCE AND SUBSTANCE OF OBJECTIVITY AND DETACHMENT FROM ROUTINE REGULATORY ACTIVITIES, OI WAS ESTABLISHED AS A CENTRALLY-DIRECTED, COMMISSION LEVEL OFFICE. THIS MEANS THAT OI INVESTIGATORS CONDUCT INVESTIGATIONS OF WRONGDOING UNDER THE SUPERVISION OF THEIR FIELD MANAGERS WHO IN TURN ARE DIRECTLY SUBORDINATE TO MY DEPUTY OR ME.

OI'S MISSION IS TO INVESTIGATE ALLEGED OR SUSPECTED WRONGDOING BY NRC LICENSEES OR OTHER ENTITIES WITHIN THE SCOPE OF NRC AUTHORITY, OR THE EMPLOYEES OR CONTRACTORS OF SUCH ENTITIES, AND PROVIDE APPROPRIATE NRC OFFICIALS THOROUGH, OBJECTIVE, AND TIMELY REPORTS OF INVESTIGATION TO ASSIST THEM IN MAKING INFORMED REGULATORY DECISIONS. AS THESE REPORTS GIVE THE NRC STAFF A BASIS TO DETERMINE THE SCOPE AND SIGNIFICANCE OF WRONGDOING ISSUES, AND TO TAKE CORRECTIVE MEASURES SUCH AS ENFORCEMENT ACTIONS, ISSUANCE OF ORDERS, RULE CHANGES, OR SIMILAR ACTIONS, THEN CLEARLY THE INVESTIGATIVE FUNCTION ENABLES THE NRC TO CARRY OUT ITS STATUTORY MANDATE IN A MORE EFFECTIVE WAY.

YOU HAVE ALSO ASKED MY VIEW ON THE ADEQUACY OF EXISTING INVESTIGATIVE AUTHORITIES AND RESOURCES. CURRENTLY, OI DOES NOT HAVE DIRECT STATUTORY AUTHORITY SUCH AS POSSESSED BY STATUTORY INSPECTORS GENERAL. RATHER, THE AUTHORITY THAT IT HAS IS THAT WHICH HAS BEEN DELEGATED BY THE COMMISSION. THESE DELEGATIONS OF AUTHORITY AND THE 27 COMMISSION-MANDATED OI POLICY STATEMENTS CONSTITUTE OI'S AUTHORITY TO INVESTIGATE LICENSEE WRONGDOING. TO DATE, THIS AUTHORITY HAS BEEN SUFFICIENT TO ALLOW OI TO CARRY OUT ADEQUATELY ITS RESPONSIBILITIES.

ON THE OTHER HAND, I MUST CONDITION THIS LAST STATEMENT. ALTHOUGH OUR AUTHORITY IS CURRENTLY ADEQUATE, IT COULD CHANGE TOMORROW WITH A 3-2 VOTE OF THE COMMISSION AS, FOR THAT MATTER, COULD THE VERY EXISTENCE OF OI. WITHOUT SOME CODIFICATION OF OI AUTHORITY, THE VERY FOUNDATIONS OF OI AUTHORITY ARE SUBJECT TO BEING REVISITED AND REEVALUATED AS NEW COMMISSIONERS ARE APPOINTED. RECENTLY, I APPROACHED THE COMMISSION TO REQUEST REVALIDATION OF OUR BASIC 27 POLICY STATEMENTS. THE COMMISSION DID SO, BUT THE MEETING REEMPHASIZED THE NEED TO ENSURE THAT THE BASIC INVESTIGATIVE AUTHORITIES OF OI ARE GIVEN SOME DEGREE OF PERMANENCE, OR AT LEAST STABILITY, IF OI IS TO CONTINUE TO CONTRIBUTE EFFECTIVELY TO THE NRC'S SAFETY MISSION.

AT THE PRESENT, OI IS AUTHORIZED A TOTAL OF 45 POSITIONS. THIRTY-FOUR OF THESE ARE INVESTIGATORS, SIX OF WHOM ARE AT OI HEADQUARTERS (OI:HQ). THE BALANCE ARE ASSIGNED TO THE FIVE OI FIELD OFFICES WHICH ARE CO-LOCATED WITH THE FIVE NRC REGIONAL OFFICES. THERE ARE 28 FIELD INVESTIGATORS, INCLUDING SUPERVISORS, TO CONDUCT WRONGDOING INVESTIGATIONS THROUGHOUT THE NATION.

ALTHOUGH WE DO PROVIDE SOME INVESTIGATIVE ASSISTANCE FROM OI HEADQUARTERS, WE FIND THAT SUCH JUGGLING ADVERSELY AFFECTS OUR ABILITY TO FUNCTION ADEQUATELY AT OI:HQ. AS THE MANAGERIAL AND OPERATIONS SUPPORT STRUCTURE WE HAVE IN PLACE AT OI:HQ IS THE MINIMUM NEEDED TO GUIDE AND DIRECT A NATIONWIDE INVESTIGATIVE PROGRAM, CASES AWAITING REVIEW STACK UP, FOIA REQUESTS ARE DELAYED, AND THE MYRIAD OF ADMINISTRATIVE FUNCTIONS OF THE OFFICE ARE DISRUPTED. OI'S CURRENT RESOURCES SIMPLY ARE NOT ADEQUATE TO INVESTIGATE ALL ALLEGATIONS OF WRONGDOING IN A TIMELY MANNER. I BELIEVE THE SUBCOMMITTEE IS AWARE FROM DOCUMENTS THAT I HAVE PROVIDED PREVIOUSLY THAT WE HAVE ASKED FOR ADDITIONAL POSITIONS ON SEVERAL OCCASIONS. OF COURSE, FEW EXECUTIVES FEEL THEIR ORGANIZATIONS ARE STAFFED ADEQUATELY, BUT LET US LOOK AT SOME ADDITIONAL FACTORS.

WE CURRENTLY HAVE ABOUT 57 CASES THAT ARE NOT BEING WORKED FOR LACK OF RESOURCES. ADDITIONALLY, WE HAVE ALREADY CLOSED 36 CASES ADMINISTRATIVELY FOR THE SAME REASON - LACK OF RESOURCES. IT IS IMPORTANT TO NOTE THAT EACH OF THESE CASES INVOLVED MATTERS OF

ALLEGED OR SUSPECTED WILLFUL VIOLATIONS OF NRC REQUIREMENTS. EACH WAS INITIATED ON THE BASIS THAT WRONGDOING WAS BELIEVED BY RESPONSIBLE, SENIOR NRC OFFICIALS TO EXIST. THUS, THESE CASES REPRESENT INSTANCES OF WRONGDOING THAT WERE NOT INVESTIGATED SOLELY BECAUSE OF LACK OF INVESTIGATIVE RESOURCES.

AT THE SAME TIME, OI LACKS SUFFICIENT RESOURCES TO INITIATE ANY PROACTIVE PROGRAMS. WE COULD NOT, FOR INSTANCE, IDENTIFY AREAS OF PARTICULAR VULNERABILITY FOR INVESTIGATIVE AUDITS OR SURVEYS LIKE CERTAIN OFFICES OF INSPECTORS GENERAL WHEN OI CANNOT EVEN MEET THE DEMANDS OF THE REACTIVE PROGRAM. RELATEDLY, ALTHOUGH WE HAVE AN ACTIVITY CATEGORY CALLED "ASSISTANCE TO INSPECTION" WHERE OI INVESTIGATORS ASSIST STAFF INSPECTORS IN MATTERS WHERE THE SKILLS OF AN INVESTIGATOR ARE USEFUL SUCH AS EVALUATIONS OF LICENSEE INVESTIGATIVE PROGRAMS, OR WHERE LARGE NUMBERS OF INTERVIEWS ARE CONTEMPLATED, WE HAVE HAD TO CURTAIL THIS ASSISTANCE SHARPLY NOTWITHSTANDING ITS OBVIOUS VALUE TO THE NRC MISSION.

RESOURCES NOTWITHSTANDING, I DO NOT MEAN TO SUGGEST THAT THOSE CASES THAT WE DO UNDERTAKE ARE NOT DONE ADEQUATELY. THROUGH AUGUST 31, 1987, THIS SMALL STAFF HAS CLOSED OVER 700 CASES. THERE HAVE BEEN ABOUT 70 REFERRALS OF POTENTIALLY CRIMINAL MATTERS TO THE DEPARTMENT OF JUSTICE FOR THEIR PROSECUTIVE REVIEW. OI INVESTIGATORS HAVE RECEIVED PRAISE FROM SEVERAL QUARTERS INCLUDING THE ATTORNEY GENERAL OF THE UNITED STATES. OF EVEN MORE DIRECT VALUE TO THE NRC, OUR INVESTIGATIONS HAVE FORMED THE BASIS FOR MANY NRC ESCALATED ENFORCEMENT ACTIONS. IN SHORT, WHAT WE ARE ABLE TO GET TO, WE DO WELL.

I DO NOT WISH TO OVERSTATE OI'S ROLE IN THE PROTECTION OF THE PUBLIC HEALTH AND SAFETY. HISTORICALLY, WRONGDOING REPRESENTS A SMALL PERCENTAGE OF THE ENFORCEMENT ACTIONS TAKEN BY THIS AGENCY. FOR INSTANCE, OI HAS INITIATED ABOUT 850 INVESTIGATIONS OVER THE PAST FIVE AND ONE-HALF YEARS; THE STAFF HAS CONDUCTED THOUSANDS OF INSPECTIONS DURING THE SAME PERIOD. THE 70 OI REFERRALS TO THE DEPARTMENT OF JUSTICE REPRESENT A FRACTION OF THE THOUSANDS OF NRC ENFORCEMENT ACTIONS DURING THE SAME PERIOD. NONETHELESS, NUMBERS ALONE DO NOT NECESSARILY DEPICT THE IMPORTANCE OF OI EFFORTS TO THE REGULATORY PROCESS.

AS I NOTED ABOVE, WRONGDOING, PARTICULARLY IF UNDETECTED, UNDERMINES THE INTEGRITY OF THE NRC REGULATORY PROCESS, A PROCESS THAT RESTS ON THE PRESUMPTION THAT LICENSEES WILL MAKE A GOOD FAITH EFFORT TO COMPLY WITH NRC REQUIREMENTS. ALTHOUGH THE FREQUENCY OF OCCURRENCE OF WRONGDOING MAY BE PROPORTIONALLY SMALL, 850 CASES IN A LITTLE OVER FIVE YEARS INDICATES THAT WRONGDOING IS A SIGNIFICANT PROBLEM THAT MUST CONTINUE TO BE ADDRESSED. CERTAINLY PERSONS WHO CANNOT BE TRUSTED TO COMPLY WITH NRC REQUIREMENTS REPRESENT AS MUCH A THREAT TO THE PUBLIC HEALTH AND SAFETY AS DO DEFECTIVE COMPONENTS. CONSEQUENTLY, ALLEGATIONS OF WRONGDOING OR DEFICIENT CHARACTER OR INTEGRITY OF LICENSEES MUST BE INVESTIGATED AND DOCUMENTED, AND AGENCY DECISION MAKERS MUST BE ABLE TO RECEIVE THOROUGH, TIMELY, AND OBJECTIVE REPORTS OF INVESTIGATION CONCERNING SUCH MATTERS, IF WE ARE TO PRESERVE THE INTEGRITY OF THE REGULATORY PROCESS. NOTWITHSTANDING SOME INITIAL RESISTANCE TO

THE OI CONCEPT, I BELIEVE THAT MOST NRC SENIOR EXECUTIVES SHARE THIS CONVICTION. THERE IS FAR FROM A CONSENSUS, HOWEVER, AS TO THE OPTIMUM ORGANIZATIONAL CONFIGURATION FOR THE INVESTIGATIVE FUNCTION.

I BELIEVE THAT THE SUBCOMMITTEE IS AWARE THAT ON MAY 18, 1987, I PROVIDED SENATOR GLENN MY VIEWS REGARDING S.908 WHICH WOULD PROVIDE, INTER ALIA, FOR THE ESTABLISHMENT OF A STATUTORY NRC OFFICE OF INSPECTOR GENERAL. (A COPY OF THIS LETTER IS APPENDED TO MY TESTIMONY). IT IS NO SECRET THAT MY POSITION DIFFERED FROM THAT OF THE COMMISSION WHICH I UNDERSTAND OPPOSES THIS CONCEPT. I DO NOT ENJOY TAKING A POSITION CONTRARY TO THAT OF MY SUPERVISORS, BUT I FEEL AN OBLIGATION TO PROVIDE YOU MY VIEWS ON THIS SUBJECT. TO MY KNOWLEDGE, THESE ARE THE VIEWS OF MY ENTIRE PROFESSIONAL STAFF AS WELL.

SENATOR, I SUPPORT THE PROVISIONS OF S.908 EVEN MORE NOW THAT IT HAS BEEN AMENDED TO COMBINE OI AND OIA IN THE NEW OFFICE OF INSPECTOR GENERAL. AS I AM AWARE THAT THE SUBCOMMITTEE HAS SCHEDULED ANOTHER HEARING TO CONSIDER SUCH LEGISLATIVE PROPOSALS AS S.908, I WILL ONLY BRIEFLY DISCUSS THE REASONS WHY I SUPPORT THIS CONCEPT.

I BELIEVE THE MOST COMPELLING ARGUMENTS IN SUPPORT OF S.908 CAN BE FOUND NOT ONLY IN THE COMMITTEE REPORT (REPORT 100-150), BUT IN MY TESTIMONY SO FAR TODAY. AS I HAVE NOTED ABOVE, WRONGDOING, ESPECIALLY THAT WHICH MAY BE UNDETECTED, ADVERSELY AFFECTS THE INTEGRITY OF NRC PROGRAMS AND OPERATIONS, THE OBJECTIVE OF WHICH IS THE PROTECTION OF THE PUBLIC HEALTH AND SAFETY. THUS, WRONGDOING IS VERY MUCH A HEALTH AND SAFETY ISSUE. GIVEN THAT IT IS, AND THAT A STRONG INVESTIGATIVE PROGRAM IS NECESSARY TO COUNTER WRONGDOING, IT FOLLOWS THAT THE INVESTIGATIVE PROGRAM REQUIRES THE INDEPENDENCE, AUTHORITY, AND RESOURCES NEEDED TO DEAL WITH ANY WRONGDOING THAT THREATENS THE INTEGRITY OF THE REGULATORY PROCESS WHETHER COMMITTED BY LICENSEE OR NRC EMPLOYEES. A STATUTORY OFFICE OF INSPECTOR GENERAL WOULD NOT ONLY POSSESS THESE QUALITIES, BUT BRING MUCH NEEDED STABILITY TO THE COMMISSION'S INVESTIGATIVE PROGRAM.

AT THE SAME TIME, I DO NOT SEE ANY REASON WHY AN NRC OFFICE OF INSPECTOR GENERAL WOULD NOT BE AS RESPONSIVE TO NRC REQUESTS FOR INVESTIGATION AS OI AND OIA ARE NOW. IF ANYTHING, IT IS POSSIBLE THAT IT COULD BE EVEN MORE RESPONSIVE IN VIEW OF THE ECONOMIES OF SCALE GAINED BY COMBINING TWO INVESTIGATIVE OFFICES INTO ONE ENTITY, AND THE OFFICE OF INSPECTOR GENERAL BUDGETARY AND PERSONNEL STAFFING PROTECTIONS SET FORTH IN THE INSPECTOR GENERAL ACT.

IF THE SUBCOMMITTEE DESIRES, I WOULD BE PLEASED TO PROVIDE ADDITIONAL TESTIMONY REGARDING THIS MATTER IN THE FUTURE.

IN CLOSING, I APPRECIATE THE OPPORTUNITY TO TESTIFY HERE TODAY. I AM PREPARED TO RESPOND TO SUCH QUESTIONS AS YOU MAY HAVE.

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

May 18, 1987

The Honorable John Glenn
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510-6250

Dear Mr. Chairman:

During my testimony before the Government Affairs Committee on April 9, 1987, I indicated that I supported the establishment of a statutory inspector general for the NRC, and that my staff and I were in the process of preparing a paper reflecting the views of the Office of Investigations regarding that office. You stated that such a paper would be welcome and included in the Hearing Record. This is that paper.

The Office of Investigations supports and endorses the provisions of S.908 that would provide for the establishment of a statutory Office of Inspector General in the NRC; however, we believe that S.908 requires some modification if it is to assure the integrity and independence of the NRC investigative program. Although we appreciate the intent of those provisions of S.908 which would provide certain statutory protections to the Office of Investigations, my entire staff and I strongly believe that the most effective and expedient way to achieve the objectives of this legislation would be to combine the personnel and functions of the existing Office of Investigations and Office of Inspector and Auditor within a statutory NRC Office of Inspector General. Thus, we urge that S.908 be modified in the following manner:

1. Change Section 4(a)(6)(P) to read:

   "(F) of the Nuclear Regulatory Commission, the offices of that commission referred to as the 'Office of Inspector and Auditor' and the 'Office of Investigations'";

2. Delete the following subsections of Section 8B ("Specific Provisions Concerning the Nuclear Regulatory Commission"): 8B(c), 8B(d), and 8B(e).

We recognize that combining both the external and internal investigative functions of an agency in an office of inspector general, although certainly not without precedent, is not the norm within the inspector general community. Nonetheless, we believe there are compelling reasons to depart from what may be customary in view of the extraordinary importance of the NRC investigative function to the protection of the public health and safety and the common defense and security, coupled with the well-documented problems that have attended the NRC investigative program since the earliest days of the agency. Those of us in the Office of Investigations, some of whom have been with the NRC since 1975, are particularly knowledgeable of the depth and breadth of these programmatic problems. For this reason, we respectfully suggest that our views may be of particular value to the Committee in its deliberations.

In enclosure 1 to this paper, we discuss eight major points in favor of this combined office of inspector general. These points are:

1. IT WOULD PROVIDE STATUTORY INDEPENDENCE AND AUTHORITY FOR THE NRC INVESTIGATIVE PROGRAM.
2. THE CURRENT BIFURCATED NRC INVESTIGATIVE PROGRAM FAILS TO DEAL EFFICIENTLY AND EFFECTIVELY WITH COMPLEX NRC INVESTIGATIONS.
3. THE INSPECTOR GENERAL ACT OF 1978 DOES NOT DISTINGUISH BETWEEN INTERNAL AND EXTERNAL INVESTIGATIVE FUNCTIONS. RATHER, IT SPEAKS TO IG AUTHORITY REGARDING THE CONDUCT OF INVESTIGATIONS RELATED TO THE "PROGRAMS AND OPERATIONS" OF AN ESTABLISHMENT.
4. OI INVESTIGATIONS ARE PRIMARILY RELATED TO NRC PROGRAMS AND OPERATIONS. THE NRC ITSELF IS THE "VICTIM" OF DELIBERATE VIOLATIONS OF NRC REQUIREMENTS AS SUCH ACTS DEPRIVE NRC OF THE "TOOLS", I.E. ESSENTIAL INFORMATION, THAT IT NEEDS TO PROTECT THE PUBLIC HEALTH AND SAFETY.
5. ANY NRC INVESTIGATIVE FAILURES ARE OF POTENTIALLY GREAT SIGNIFICANCE DUE TO THE PUBLIC HEALTH AND SAFETY IMPORTANCE OF NRC OPERATIONS.
6. THE INVESTIGATIVE PRODUCTS OF THE INSPECTOR GENERAL COULD BE USED TO SUPPORT NRC REGULATORY EFFORTS AS OI INVESTIGATIONS NOW ARE USED EVEN THOUGH OI IS NOT PART OF THE NRC STAFF APPARATUS.
7. COMBINING OI AND OIA WITHIN AN OFFICE OF INSPECTOR GENERAL ENSURES THAT THE NRC INVESTIGATIVE PROGRAM IS STAFFED WITH PROPERLY QUALIFIED INVESTIGATIVE AND MANAGERIAL PERSONNEL.
8. THERE WOULD BE AN ECONOMY OF SCALE IN COMBINING THE OFFICES DUE TO REDUCED OVERHEAD AND TRAVEL.

In sum, it is our belief that the problems associated with the NRC investigative program that were discussed on April 9, would not be remedied by the current provisions of S.908, nor by any other current initiative of which we are aware. It is for this reason that we urge that the proposed NRC Office of Inspector General encompass the functions of both the Office of Investigations and the Office of Inspector and Auditor.

The problems or shortcomings that we are attempting to resolve are endemic and longstanding. They predate the tenure of any particular NRC executive. Thus our recommendations should not be construed as criticism of either current or former members of this Commission. Indeed, it is precisely because these problems have persisted throughout the history of this agency that we feel so strongly about the need for statutory relief. It is encouraging that the Commission has issued its April 20, 1987 public statement of concern and support for the NRC investigative program. We are convinced that the Commission sincerely intends to fix what may be broken. But the issue here is not sincerity; rather, it is a matter of consistency over the long haul. A combined NRC Office of Inspector General should ensure this consistency.

Five years ago, the Commission unanimously established the Office of Investigations in reaction to severe Congressional criticism of the NRC's investigative program. The date of that public announcement was April 20, 1982. As your Hearing established, the professed enthusiasm for such a program waned as the years went by. By ironic coincidence, the Commission finds itself once again issuing a public announcement stating its intention to remedy Congressionally-identified problems in its investigative program five years later to the day -- April 20, 1987. We suggest that the statutory protections that would be afforded the investigative program were it to be combined within an office of inspector general should be sufficient to preclude the need for future announcements of this nature.

Sincerely,

Ben B. Hayes

Ben B. Hayes, Director
Office of Investigations

Enclosure:
As Stated

cc w/encl.:
Sen. William V. Roth, Jr.
Chairman Zech
Commissioner Asselstine
Commissioner Bernthal
Commissioner Carr

OFFICE OF INVESTIGATIONS VIEWS ON THE NEED FOR AND COMPOSITION OF A STATUTORY OFFICE OF INSPECTOR GENERAL FOR THE NRC

The Office of Investigations favors the establishment of a statutory Office of Inspector General for the NRC. We believe that such an office should combine the personnel and functions of the NRC Office of Inspector and Auditor (OIA) and the Office of Investigations (OI). We offer the following statements in support of our position:

1. IT WOULD PROVIDE STATUTORY INDEPENDENCE AND AUTHORITY FOR THE NRC INVESTIGATIVE PROGRAM.

Currently, neither OI nor OIA are statutory offices. Either could be disestablished by a Commission vote. Although an unlikely event regarding the latter, the future of a non-statutory OI is less certain in view of the fact that the Commission has considered placement of OI under the Executive Director for Operations on three occasions. Moreover, the current Executive Director for Operations once proposed in writing that OI be made a part of the Office of Inspection and Enforcement rather than remain a separate office. (The Office of Inspection and Enforcement, a non-statutory office itself, was disestablished by Commission vote effective April 11, 1987.)

Neither OIA nor OI have any authority other than that delegated to them by the Commission. Whereas an inspector general has statutory authority to issue subpoenas or to administer oaths or affirmations, the Directors of OIA and OI must have this authority delegated to them by the Commission which could choose to limit the exercise of this authority. This has in fact happened with OI which must seek Commission review of any proposed subpoenas.

This has also been the case with the referral of criminal matters to the Department of Justice. It is just recently (April 20, 1987) that the Commission elected to allow OI to refer matters to the Department of Justice without mandatory consultation with the NRC Office of General Counsel, and in the case of material false statements, allowing OI to make referrals without consultation with the Commission.

Each of the above concerns would be alleviated if both offices were part of a statutory office of inspector general as the Inspector General Act of 1978 provides clearcut statutory authority and independence.

2. THE CURRENT BIFURCATED NRC INVESTIGATIVE PROGRAM FAILS TO DEAL EFFICIENTLY AND EFFECTIVELY WITH COMPLEX NRC INVESTIGATIONS.

NRC currently has a bifurcated investigative program that is apparently based on the assumption that NRC investigations are either internal (in which case they are OIA jurisdiction) or external (in which case they belong to OI). In fact the distinction between them in practice is blurred.

One of the purposes of an NRC investigation is to identify the causes of the problem that is the focus of the investigation. In some cases, the root cause of the problem may be ineffective regulation by the NRC as well as wrongdoing by a licensee. Any investigation that focusses on only one of these aspects would fail to present a balanced picture regarding the real dimensions of the problem. Yet, this is precisely what happens so long as an artificial distinction is made between internal and external investigations.

On several occasions, OI investigators conducting an "external" investigation have developed or received allegations of NRC misconduct related to the matter being investigated. Typically such information might suggest that NRC employees were aware of the wrongdoing that OI was investigating and helped to conceal the matter from the NRC, or that an NRC employee has lost his or her objectivity. Although OI investigators would document such information and provide it to OIA, this approach presents certain difficulties.

First, it imposes a delay. Such information may arise spontaneously, sometimes because of the rapport the OI investigator has managed to establish with an interviewee. A subsequent interview by an OIA investigator may not be as productive because of the delay caused by the need to contact OIA and for OIA to arrange for an interview. Second, OI investigators feel uneasy developing such information. They fear being accused of having overstepped their authority and having intruded into a matter of OIA jurisdiction. Third, regardless of the degree of cooperation that may exist between the two offices, the chances of a matter "falling through the crack" are far greater than if there were only one NRC office responsible for conducting all investigations.

There are also problems that arise when both offices are investigating matters related to the same facility such as has happened with the Tennessee Valley Authority, Fermi, and Comanche Peak. Licensee employees may be interviewed by investigators from both offices which in itself could create unnecessary confusion and frustration on the part of interviewees who generally are not familiar with the functional distinctions between the two offices. At the same time, there is usually little if any coordination of either interview arrangements or results. Although this may be understandable given the need for OIA to hold employee misconduct information closely, it nonetheless does not make for an integrated or efficient investigative program.

In sum, the NRC investigative program does not lend itself to a neat cleavage between internal and external investigations. As noted above, there is frequently overlapping jurisdiction so long as the NRC investigative program is divided along these lines. Combining OI and OIA within an office of inspector general would provide for a truly integrated investigative program that could deal with the full dimensions of any investigative matter.

3. THE INSPECTOR GENERAL ACT OF 1978 DOES NOT DISTINGUISH BETWEEN INTERNAL AND EXTERNAL INVESTIGATIVE FUNCTIONS. RATHER, IT SPEAKS TO IG AUTHORITY REGARDING THE CONDUCT OF INVESTIGATIONS RELATED TO THE "PROGRAMS AND OPERATIONS" OF AN ESTABLISHMENT.

The Inspector General Act (at § 4) states that the Inspector General has the "duty and responsibility" to, "... conduct, supervise, and coordinate ...investigations relating to the programs and operations of such establishment." The Inspector General Act does not differentiate between internal and external functions. In reality, no Office of Inspector General (OIG) conducts investigations only of agency employees. Rather, they conduct investigations of matters affecting the integrity of agency programs. Thus, considerable office of inspector general investigative effort is directed to instances of fraud against the government, typically, but not invariably, contract fraud. Although one of the purposes of such investigations is the recovery of government monies and the prevention of fraud and waste, the underlying rationale is the protection of agency programs.

For example, the Department of Defense Office of Inspector General conducts investigations of Defense contractors to assure that the products or services provided the government are of sufficient quality that the Department of Defense mission is enhanced rather than degraded. Thus, the primary Department of Defense interest in a case such as substitution of substandard fasteners in Army tanks is not just the waste of government money; it is to ensure that the tanks are safe and can perform as originally designed. Similarly, NASA Office of Inspector General investigations are motivated by a concern that shuttle components are safe rather than merely concentrating on cost overruns. inspectors general of agencies with loan programs (such as HUD, VA. Commerce, EPA, etc.) are concerned that their agency appropriations are being used to further agency (and societal) programs. Dollar recovery is important, but in the context that dollars diverted diminish the effectiveness of agency programs.

There also are some inspectors general (such as Agriculture) whose inspectors general are involved in the investigations of "external" offenses such as Food Stamp violations, fraud in food inspection programs etc. Thus, the NRC combined office Office of Inspector General would not be one of a kind (not that being one of a kind is necessarily a flaw given the nature of the NRC mission).

It should also be noted that OI investigations are primarily fraud investigations. A licensee or other entity is investigated because of an attempt to defraud the NRC. Thus, falsified documents, material false statements, and willful violations of NRC requirements, like the contract frauds investigated by other agency inspectors general, represent an attempt to degrade the efficacy of the NRC regulatory program. Money is almost always a factor in our investigations, but not the theft or diversion of government money per se. Rather, the offenses are motivated by the savings of money - the avoidance of out-of-pocket costs by licensees that attend delay in licensing, replacement costs/ debt service during outages, or costs of backfits, upgrades, or technical fixes. On balance, in form and substance, OI investigations are similar to inspector general investigations. They are also of similar impact on program integrity.

4. OI INVESTIGATIONS ARE PRIMARILY RELATED TO NRC PROGRAMS AND OPERATIONS. THE NRC ITSELF IS THE "VICTIM" OF DELIBERATE VIOLATIONS OF NRC REQUIREMENTS AS SUCH ACTS DEPRIVE NRC OF THE "TOOLS", I.E. ESSENTIAL INFORMATION, THAT IT NEEDS TO PROTECT THE PUBLIC HEALTH AND SAFETY.

Traditional investigative organizations such as the FBI, U.S. Customs, or the U.S. Secret Service conduct investigations of violations of criminal statutes within their jurisdiction. These agencies are not the "victims" of the violations they investigate. A counterfeiter, for example, does not victimize the Secret Service. Secret Service programs are not directly degraded by such criminal activity. In contrast, the NRC is "victimized" by deliberate violations of NRC requirements. When the NRC is deprived of complete and accurate information, as would be the case with falsified records, material false statements, failure to comply with reporting requirements, or even instances of discrimination against employees who report safety concerns, the integrity and efficacy of NRC programs intended to protect the public health and safety are seriously affected. The foregoing examples represent the vast majority of OI investigations.

Finally, there may be occasions when allegations are made against the Office of Inspector General or its personnel. If this were to happen, it would be handled in the same manner the inspectors general in other agencies resolve these matters. Allegations against non-supervisory field personnel are normally investigated by the inspector general using investigators from the headquarters staff. Investigations of headquarters personnel or supervisors would be done by another agency inspector general. Both practices are used in the inspector general community.

5. ANY NRC INVESTIGATIVE FAILURES ARE OF POTENTIALLY GREAT SIGNIFICANCE DUE TO THE PUBLIC HEALTH AND SAFETY IMPORTANCE OF NRC OPERATIONS.

Few if any federal agencies have greater public health and safety responsibilities than the NRC. A regulatory breakdown could set the stage for a nuclear accident that could affect the safety of large segments of the population. As noted in the Commission's press statement of April 20, 1987, the NRC relies on thorough investigations to accomplish its regulatory activities. Any weaknesses in the NRC investigative process could adversely affect the ability of the NRC to fulfill its regulatory responsibilities. Thus, weaknesses or shortcomings in the NRC investigative program could have a direct effect on the public health and safety, common defense and security, or protection of the environment.

Given the foregoing, it is reasonable to conclude that the NRC investigative program is extraordinary if not unique with respect to its direct relationship to the public health and safety. We suggest, then, that it is not unreasonable to structure the NRC investigative program in an extraordinary manner if that is what is needed to assure its integrity and independence. Whether the structure of the NRC investigative program comports with that of other federal agencies is at best a secondary issue.

Inspectors general were created in recognition of the need to assure the integrity of government programs. Based on the record established since the Inspector General Act of 1978 established the first inspectors general in various federal agencies, it is reasonable to conclude that inspectors general are a highly effective way to structure agency investigative programs to ensure program integrity. Given that, it is reasonable to conclude that the inspector general concept would be especially suitable for the protection of NRC program integrity - particularly in view of the safety implications alluded to above.

6. THE INVESTIGATIVE PRODUCTS OF THE INSPECTOR GENERAL COULD BE USED TO SUPPORT NRC REGULATORY EFFORTS AS OI INVESTIGATIONS NOW ARE USED EVEN THOUGH OI IS NOT PART OF THE NRC STAFF APPARATUS.

It has been suggested that if OI were to become part of an office of inspector general, its investigative products could no longer be used by the NRC in support of enforcement actions, licensing actions, or other NRC efforts. That is not correct.

First, it should be noted that inspectors general do work for their agencies, and the bulk of their investigative products are used by the agency heads/program managers to remedy agency or program problems. The inspectors general work for neither the Congress nor OMB. They report to the agency head. The process for appointment of inspectors general and the requirement for reports to Congress help protect the independence of the investigative process, but do not remove any office of inspector general from the primary role of providing investigative support to his or her agency.

Second, even if the office of inspector general were independent of the agency, the investigative support could be the same. This is the situation with the various federal law enforcement agencies that support Department of Justice prosecutors. For example, the Secret Service is not part of the Department of Justice, but cooperates with the Department by providing the requisite investigative support for the prosecution of counterfeiting cases or other matters within Secret Service jurisdiction.

Third, the Office of Investigations currently is independent of its major client, the NRC Staff much in the same way an inspector general would be. Yet OI investigations are conducted in support of the NRC enforcement program which is an NRC Staff function. The Office of Investigations provides its reports of investigation to the Staff which then is responsible for preparing and presenting the enforcement case. The Office of Investigations may assist the Staff when requested, but by and large, the NRC enforcement program has functioned well for almost five years, even though the Office of Investigations has been independent of it. Thus, it is reasonable to assume that an office of inspector general could provide the same degree of investigative support.

7. COMBINING OI AND OIA WITHIN AN OFFICE OF INSPECTOR GENERAL ENSURES THAT THE NRC INVESTIGATIVE PROGRAM IS STAFFED WITH PROPERLY QUALIFIED INVESTIGATIVE AND MANAGERIAL PERSONNEL

If Congress is concerned about preserving the integrity and independence of the Office of Investigations, S.908 leaves a loophole that could allow this independence to be eroded. There is nothing to prevent the replacement of current OI management and/or investigative personnel with other NRC personnel who may lack investigative training or experience, or who may be opposed to the very concept of an independent Office of Investigations. Thus, although the office may appear to be independent on paper, it could be partly or substantially staffed by persons who would cause OI to operate essentially as a part of the NRC Staff.

At the present, not only does the Director of the Office of Investigations serve at the pleasure of the Commission, but he lacks the statutory authority to appoint subordinate investigative or managerial personnel. It is possible, perhaps even likely, that the Office of Investigations could be forced to accept personnel that the Director did not want. Were the Office of Investigations to be part of the Office of Inspector General, the Inspector General would have sole authority to appoint his or her own subordinates.

This is not merely a theoretical concern. There have been several suggestions over the past two years that technical personnel should be assigned to the Office of Investigations. Indeed, at a time when requests for additional qualified investigators were rebuffed, it was made clear that the Commission would approve the transfer of certain technical personnel to OI. On three occasions, the Director of OI was offered the services of certain senior executives without regard to the current OI staffing ceiling. This eventually culminated in the reassignment of a senior executive to OI who lacked an investigative background and whose services had not been sought by the Director.

8. THERE WOULD BE AN ECONOMY OF SCALE IN COMBINING THE OFFICES DUE TO REDUCED OVERHEAD AND TRAVEL.

First, it would be reasonable to assume that there could be a reduction in the number of secretarial positions at the headquarters level. Similarly, operations support functions such as FOIA/PA, personnel, and budget could be consolidated. There could be a reduction in some managerial positions as well. Second, the current OI field structure could provide a field structure for the new Office of Inspector General. This could reduce travel costs significantly as much of travel by OIA investigators is to NRC regional offices. There also would be a cost saving in not having to send two sets of NRC investigators to work related cases at the same facility. As described above, there could be additional cost savings due to the increased efficiency of the investigative process. There would also be the direct savings of reducing the number of investigators traveling to any one location.

Office of Inspector and Auditor

AFTERNOON SESSION—2:04 P.M.

OPENING STATEMENT OF HON. JOHN B. BREAUX, U.S. SENATOR FROM THE STATE OF LOUISIANA

Senator BREAUX. The subcommittee will please come to order.

As I indicated in my opening statement for this morning's hearing, the subcommittee this afternoon will continue its series of oversight hearings by focusing on the Nuclear Regulatory Commission's Office of Inspector and Auditor. This office has the responsibility, as specified in the Commission's 1986 annual report—

> Of conducting investigations to ascertain the integrity of all NRC operations; investigate allegations of NRC employee misconduct, equal employment, and civil rights complaints; and claims for personal property loss or damage; conducts the NRC's internal audit activities, and hears individual employee concerns regarding Commission activities under the agency's "open door" policy.

I believe that the nature and the extent of the stated responsibilities for this office indicate the obvious need for independent action. While we would all like to think that Government employees, including the members and employees of the NRC, all conduct themselves in a highly professional manner, providing a model of integrity to be followed by the Commission's licensees, we have learned in our history that this is not always the case. As was the case with this morning's hearing, many of the generic issues surrounding this office in its role of fulfillment of the Commission's health and safety mandate are not the stuff of newspaper headlines. However, the failure to recognize the importance of this office and the failure to provide it with sufficient resources and proper independence result in headlines that none of us like to see, headlines that undermine public confidence in our ability to regulate safely the peaceful use of atomic energy, and headlines that do not portend well for the future of nuclear energy.

This afternoon we would like to welcome our first panel, which are the Commission members who were with us this morning. We appreciate your coming back this afternoon. Mr. Chairman, if you would present your statement on behalf of the Commission, we would be pleased to receive it.

STATEMENT OF HON. LANDO W. ZECH, JR., CHAIRMAN, NUCLEAR REGULATORY COMMISSION, ACCOMPANIED BY THOMAS M. ROBERTS, COMMISSIONER; KENNETH M. CARR, COMMISSIONER; FRED BERNTHAL, COMMISSIONER; AND KENNETH C. ROGERS, COMMISSIONER

Mr. ZECH. Thank you, Mr. Chairman.

Mr. Chairman, my fellow Commissioners and I are pleased to appear before you this afternoon to discuss the Nuclear Regulatory Commission's Office of Inspector and Auditor, OIA. I will begin with a description of the functions of the office, then discuss its relationship with the Commission and the NRC staff, and conclude by explaining why we believe there is no need for a statutorily-established Inspector General within the NRC.

First of all, regarding the mission of OIA, the Office of Inspector and Auditor has existed at the NRC since the agency commenced operations in 1975. It has two primary responsibilities: first, to audit NRC operations to ensure that agency activities are conducted effectively, efficiently and with integrity; and second, to investigate alleged wrongdoing by any NRC employee or contractor. Nearly two-thirds of OIA's resources are devoted to the audit function. The remaining resources are devoted to the investigation of NRC employees and contractors. OIA has the requisite authorities and resources to implement an effective investigative and audit program.

The functions performed by OIA are separate and distinct from those performed by the Commission's Office of Investigations, OI. As I testified this morning before this subcommittee, OI's sole responsibility is to investigate alleged wrongdoing by licensees, their employees, contractors, vendors, or others in the regulated industry.

OIA's relationship to the Commission and to the NRC staff can best be summarized as follows. Like OI, OIA is a Commission-level office, and therefore the Office Director reports directly to the Commission. It operates with minimal Commission supervision. OIA develops its own audit program after asking for recommendations from the Commission and the Executive Director for Operations, the EDO. Although some of its investigations are self-initiated as a result of information obtained through its audits, most of its investigations are conducted as a result of allegations that are brought to OIA's attention by the Commission, NRC employees, or by others. OIA has the authority to set its own priorities. The Commission occasionally directs OIA to give high priority to matters which impact the Commission's safety discussions.

Once an audit or investigation is initiated, OIA independently conducts investigations, reaches conclusions, and refers matters to the Department of Justice. The office always has had, and must continue to have, the independence to determine how specific investigations should be conducted and it must be free to draw its own conclusions based on the information developed. In the vast majority of cases, conclusions in OIA's investigative reports are accepted by management.

If OIA obtains information that would assist OI in ongoing OI investigations, OIA provides that information to OI. In the past two years, OIA has referred 10 matters to OI. Similarly, if it obtains information that is pertinent to the safety responsibilities of the staff, the information is provided to the EDO. OIA has referred 12 technical matters to the EDO in the past two years. The directors of OIA and OI and the EDO also hold periodic meetings to discuss matters of mutual interest.

If the EDO determines that a matter should be given top priority attention, this is communicated to OIA. OIA tries to accommodate the EDO's scheduling recommendations whenever possible; thus, there is an appropriate relationship and level of communication between OI, OIA, and the EDO.

Regarding the need for an Inspector General, the Commission does not quarrel over the basic concept of Inspector General. The need for an independent and objective internal investigative and audit unit within the NRC was recognized at NRC's inception in 1975. Hence, the Commission established OIA to perform that function. The Commission believes that OIA as currently structured affords the best mechanism for accomplishing these tasks.

S. 908, the Inspector General Act Amendments of 1987, as reported by the Senate Committee on Governmental Affairs, would establish an Inspector General within the NRC. This legislation would slightly modify OIA's current duties. For example, the office would be required to prepare a report on its activities and findings to Congress semiannually, and review on an ongoing basis existing and proposed legislation for impact, efficiency, and susceptibility to fraud and abuse. The principal change, however, would be to make the Inspector General subject to Presidential appointment, confirmation by the Senate, and Presidential removal. The added responsibilities would require additional resources.

This may appear to be a small change, but it is a change which merits some reflection before the Congress acts to extend for the first time what may be a perfectly sound concept within the confines of the Executive Branch to the somewhat different environment of a small, independent regulatory commission like the NRC.

We have not one, but five independent officials, appointed by the President and confirmed by the Senate, acting jointly to manage the agency and to act in the public interest. NRC's licensing process operates in an open and highly charged environment in which the staff's work product is tested and retested before licensing boards, appeal boards, the Advisory Committee on Reactor Safeguards, and the Commission itself. Under these circumstances, it is difficult for us to see how providing the Commission with an Inspector General subject to Presidential appointment and removal would better assure effectiveness, efficiency, and integrity in the NRC's operations.

We believe that OIA, as it is currently organized, functions in most instances to serve the Commission and the public effectively.

Thank you, Mr. Chairman. We appreciate this opportunity to appear before the subcommittee today and are ready to answer the questions you may have.

Senator BREAUX. Thank you very much.

Anyone else have any comments to add at this time?

[No response.]

Senator BREAUX. Give an example of the workload of the OIA. Approximately how many cases have they been handling, Mr. Chairman, on an annual basis? Is there a number that they normally consider within a year's time?

Mr. ZECH. Let me give you the figures for fiscal year 1986, Mr. Chairman.

OIA conducted 21 audits, which resulted in 79 recommendations. They had 22 follow-up audits in fiscal year 1986.

Senator BREAUX. These audits that you're speaking of are pending within the NRC itself?

Mr. ZECH. These are audits, Mr. Chairman, of various activities within our agency, and a rather thorough look at whether those activities are properly performing their functions.

Senator BREAUX. But these audits, to distinguish them from something that OI would do with regard to licensees, these audits are internal to the operations of NRC?

Mr. ZECH. Yes, sir. They are internal audits of NRC activities.

Senator BREAUX. Okay.

Mr. ZECH. And there were 52 investigative reports conducted by OIA, and 22 matters were referred to the Federal Bureau of Investigation. That gives you the fiscal year 1986 overview of their activities.

Senator BREAUX. Give me the second—not the audits, but the investigations?

Mr. ZECH. Yes—52 investigative reports were made by the Office of Inspector and Auditor.

Senator BREAUX. And how many were referred to Justice?

Mr. ZECH. And 22 matters were referred to the FBI.

Senator BREAUX. To the FBI?

Mr. ZECH. Yes, sir.

Senator BREAUX. That's in one year?

Mr. ZECH. One year.

Senator BREAUX. Do you have that broken down as to what type of investigations these were?

Mr. ZECH. I don't have it in front of me.

Senator BREAUX. Maybe they could give us that when we ask the OIA people.

Mr. ZECH. Yes, sir. We can get that for you, Mr. Chairman.

Senator BREAUX. Okay.

Now, let me ask you, the authority for OIA to investigate a matter comes from where?

Mr. ZECH. Well, their authority, of course, comes from the Commission. But the Commission has given OIA the authority to investigate matters that they feel are appropriate concerning NRC employees.

Senator BREAUX. Let's pursue that further. Does OIA, when they receive a complaint—perhaps from the field or from some anonymous source—do they have to visit with the Commission's General Counsel to get approval as to whether they should pursue this? Or do they have the authority to do it completely independent of having to check with anybody at the NRC?

Mr. ZECH. They have the authority to initiate the investigation themselves as long as they deem that it's an appropriate investigation.

Senator BREAUX. Does NRC have the authority to halt an investigation that you or the Commission members would think would be something that is unnecessary?

Mr. ZECH. We do have the authority to halt an investigation if we feel it's appropriate, in theory. My understanding is that in practice it hasn't been done very often. I'm not sure if it's ever been done. I'm not aware if it's ever been done, but we do have that authority if we thought it was appropriate to do so.

Senator BREAUX. Do you know if OIA has to reach any threshold before their authority allows them to pursue any wrongdoing, from an investigative standpoint?

Mr. ZECH. It's my understanding that OIA does have some criteria for determining whether an investigation merits their attention and efforts, but I don't know the details of that right now, Mr. Chairman. I could supply that for the record or have OIA give you that information. They do have criteria that they have to meet; they don't just conduct an investigation on what they might term "frivolous" action, but it's their determination to do so.

Senator Breaux. Does OIA have any type of memorandum that exists, like OI has, outlining their duties and responsibilities?

Mr. Zech. Yes, they do. Again, I don't know that it's in the same form as we have for OI. OI has a manual and specific directives. OIA does have a manual the same as OI, I'm informed.

Senator Breaux. Has the Commission, in your tenure as a Commissioner—have you ever had to meet with your Director with regard to the area of responsibility that they have, like we apparently had some meetings with the OI Director?

Mr. Zech. I meet with the Director of OIA periodically, Mr. Chairman. She comes to brief me about once every two weeks or so to give me a status report of the important matters. She also comes to brief the Commission as a body periodically. We are, I would say, very well aware of the significant actions that are going on in the Office of Inspector and Auditor.

Senator Breaux. In your statement, Admiral, you point out that "OIA has referred 12 technical matters to the EDO in the past 2 years." I'd like you to provide for the record—or now, if you have them—a listing of those technical matters that you describe so that we'd have it for the record.

Mr. Zech. I'd be pleased to provide those for the record, Mr. Chairman.

[The information requested follows:]

OIA Investigative Matters [1] *Closed—Fiscal Year 1986*

Safety-related matters [2]	20
False statements regarding regulatory activities	3
Improper influence on commission policy	1
Fraud and misappropriation of Government resources (including contract fraud)	16
Threats versus employees/contractors	2
Prohibited/improper personnel practices	3
Other misconduct	7

[1] OIA issued 52 reports on investigative matters in fiscal year 1986. Some reports covered multiple allegations or offenses.

[2] Safety-related matters include those cases where NRC employees are alleged to have failed to carry out their regulatory responsibilities in an appropriate manner or in some other way allegedly took, or omitted to take, action which could have adversely impacted NRC's regulatory programs. Twenty reports fall into this category, including one report on the NRC's regulation of TVA in which 38 separate inquiries were conducted into allegations of breach of confidentiality, conflict of interest, nonresponse to safety concerns, inaccurate or falsified reports and various other improprieties.

REFERRALS TO EDO CONCERNING TECHNICAL ISSUES

Plant/utility	Technical issue	Date
Fiscal year 1985:		
1. Diablo Canyon I and II—Pacific Gas & Electric Co.	Design and construction concerns (8 issues)	September 1985.
Fiscal year 1986:		
1. Sequoyah, Watts Bar, Bellefonte, and Browns Ferry—Tennessee Valley Authority (TVA).	Problems with TVA's corrective action system—Computer printout involving potentially multiple issues (approximately 1,000 issues).	January 1986.

REFERRALS TO EDO CONCERNING TECHNICAL ISSUES—Continued

Plant/utility	Technical issue	Date
2. Sequoyah and Watts Bar—TVA	Problems with design changes at TVA plants (3 issues).	January 1986.
3. Watts Bar I and II—TVA	Human factors issue	June 1986.
4. Watts Bar I and II and Bellefonte I and II—TVA.	Cable installation problems (3 issues)	September 1986.
5. Diablo Canyon I—Pacific Gas and Electric Co.	Retention of design records	June 1986.
6. Catawba II—Duke	Problem with safety equipment during harsh environmental conditions.	June 1986.
7. Sequoyah Fuels Plant—Kerr-McGee Corp	Radiation control problems (7 issues)	September 1986.
Fiscal year 1987:		
1. Watts Bar I and II and Bellefonte I and II—TVA.	Cable installation problems (2 issues)	September 1987.
2. Fort St. Vrain—Public Service of Colorado	Design and construction concerns (4 issues)	April 1987.
3. Fort St. Vrain—Public Service of Colorado	Design and construction concerns (4 issues)	June 1987.
4. Byron II—Commonweath Edison	Design tolerance problems at Byron	February 1987.
5. Perry I and II—Cleveland Electric Illuminating Co.	Material control issue	May 1987.

Senator Breaux. Was last year's numbers that you gave me—52 investigations and 22 referred to the FBI—consistent? Is that a real high, out-of-kilter number or is that about what it's been averaging? Perhaps this is something I should ask Ms. Connelly about, but is this a high year or a low year or about an average year as far as the workload of OIA is concerned?

Mr. ZECH. I believe it's higher than some, but I don't have the specifics, Mr. Chairman.

Senator BREAUX. We can pursue that with her. It's probably more appropriate there.

Mr. ZECH. Thank you, sir.

Senator BREAUX. With regard to S. 908, you speak, in your testimony, that it moves OIA's activities into a separate, outside Office of Inspector General, that you oppose that. I'd like some more elaboration as to why. It seems to me that OIA's duties are to investigate and audit internal activities, and the argument can be made that if there's any area that needs to be pulled back away from the group that they are responsible for investigating, it's that type of activity where we're looking at our own people, for instance.

What's your argument as to why that's not an appropriate way to go?

Mr. ZECH. My argument essentially, Mr. Chairman, is that it just simply doesn't need to be done. I believe OIA is operating effectively as it is. It seems to me they have all the independence they need to carry out effective investigations with integrity and honesty. I don't know of any influence that's been brought on OIA to do other than the proper thing.

I guess as much as anything, from the Chairman's standpoint, it seems to me that we already have a very independent agency. We start with five Commissioners that are all independent themselves. We have an independent licensing board, an independent appeals board. We have an independent Advisory Committee on Reactor Safeguards. We have an independent Office of Investigations, and we have an independent inspector and auditor. We have so many independent organizations here, Mr. Chairman, that I'm trying to pull together, that it's a real challenge; and I frankly don't think we need any more independence on this agency. What we really need is more cohesiveness and more working together.

But having said that, as far as OIA is concerned specifically, I think it's operating effectively now. As we have stated in our statement, we have no disagreement, really, in concept with the Inspector General, but we see no need to do that. OIA is effectively supporting us now and there simply doesn't seem to me to be any necessity in this rather small agency to give any more independence to that organization.

Senator **Breaux**. Well, with all due respect to that response, this morning we heard that when facts were presented or found by the Office of Investigations that seemed to involve potential internal problems within the NRC and that matter was brought to the Commissioner, the Commissioner—not you during that period, but a former Commissioner—made the decision that the matter would be handled by the Commissioner instead of by the Office of Inspector and Auditor. To me, that looks like a mechanical problem there that did not work the way I think it should have worked. Whether it's a Commissioner or a Commissioner's staff or somebody at that level—if there is potential wrongdoing, not judging whether there is or is not—but it seems to be a matter that should handled by OIA. The case that was cited this morning at the hearing was, in fact, apparently never received by OIA. That looks like the system has broken down when that type of situation can occur.

Nothing has changed from a statutory standpoint between then and now that would make any difference from a statutory nature. And my question is, if that happened once why can it not happen again and again and again, unless we make some changes?

Mr. **Zech**. Well, of course, the instance you refer to was a single instance that did occur on the Commission. As you know, since that time the Commission has put out a rather firm statement just a few months ago concerning policies and procedures for OIA investigations of Commissioners and their staffs which I think really speaks right directly to that subject. And essentially what it does is clarify for all of us and for the Commission that OIA does indeed have the authority, and is the appropriate office, to investigate Commissioners' staffs, as well as Commissioners.

Senator **Breaux**. Well, let me ask you this. I think the reasoning, or at least perhaps one reasoning, that was given during that period was, "Well, a reorganization plan of 1980 requires this matter to be handled in this way instead of the way in which the OIA would have apparently been brought into something." Does the directive that you just spoke of have any legal effect to override the reorganization plan of 1980?

Mr. **Zech**. Well, the letter I referred to was dated April 17, 1987. It's signed out by our General Counsel. The Commission requested that the General Counsel's Office to bring all this together, and I believe he's researched and referred to the statutes here that apply. We wanted to have a document that we could stand on. I believe this paper is an attempt, at least, to speak to the statutes as well as to our regulations and to clarify this situation. But the paper very clearly—to me—states that the Office of Inspector and Auditor does indeed have the authority to investigate Commissioners and Commissioners' office staffs. As I say, this paper has been prepared since the incident that you referred to. It's an effort on the part of the Commission to specifically clarify the situation. I think we've done so, Mr. Chairman.

Senator BREAUX. Admiral, I'd like to get a copy of that.

Mr. ZECH. Yes, sir. We'd be happy to supply it for the record. (See p. 225.)

Senator BREAUX. Mr. Bernthal?

Mr. BERNTHAL. Mr. Chairman, I guess I don't take issue with anything the Chairman has said except that the key point here is that while OIA has the authority, certainly, to investigate Commissioners' offices, and does, if there is no referral there is not necessarily any independent way of proceeding to investigate a Commissioner's office. In fact, the particular circumstance that I would point to, or that we have pointed to here, I would compare to the circumstance of judges, quite frankly. As you know, the Commission sits in an adjudicatory capacity, and the attitude of the Commission—I think quite correctly, given the collegial nature of this body—was that those matters really finally are up to each independent Presidential appointee to determine, and I would stand by that decision today.

But that also means, then, that there is no independent mechanism should any member of the Commission decide to handle such matters in his own office. There would be no triggering mechanism, then, for OIA to get involved. I think that summarizes the situation, at least as I see it.

Senator BREAUX. It is your opinion then, with that statement, that if there's a conflict between OIA investigating a matter and a Commissioner who says that the Commission will investigate the matter, that the Commission has the authority to overrule an interest of OIA?

Mr. BERNTHAL. In principle, the Commission has final authority with respect to OIA. As we've heard, that's never been exercised, and I am sure that in this particular case, had the matter been referred to OIA, there certainly would have been no Commission intervention. But the point was that that decision was left up to the individual Commissioner. That was not a Commission decision. And I would argue it should not be a Commission decision because once we tread down that path of deciding which of our adjudicatory colleagues we're going to begin investigating, then I think it never ends. And I would argue that you have to compare our situation to the situation of a panel of judges. That's what we are in one of our capacities.

Senator BREAUX. Admiral Zech, do you disagree with that point?

Mr. ZECH. Well, we're talking about one specific instance that occurred and we're trying to project something into the future that's a little bit hypothetical. But all I can say is that with the research we've done and the investigations we've had as regard this particular matter, I think it's clear now that OIA does have the responsibility and would be the proper authority for investigating any such matter.

On the other hand, if it came to be a significant decision matter involving a Commissioner, I think that we may decide that it would be appropriate to go ourselves—for the Commission to go to an outside investigator. We have the authority to do that if we so decide, and if the matter were significant enough. I think that first of all if it happened, frankly, I would consult with OIA and perhaps get the view from OIA and perhaps the General Counsel, too. But I would have no hesitation, if it were a significant matter, to get the views of my fellow Commissioners, of course, but to suggest that perhaps we go outside our agency. I think the Commission has the authority to do that if it would see fit.

Senator BREAUX. Has OIA ever looked into a Commissioner's activities, or the staff of a Commissioner?

Mr. ZECH. It's my understanding that they have in the past, Mr. Chairman. I don't know the details of that, but it's my understanding that that has occurred.

Senator BREAUX. Recently?

Mr. ZECH. I'm not sure if it's recently or not. I understand ten times in the last three years, so I guess that's a rather significant number, bigger than I would have assumed. That's ten times.

Senator BREAUX. I'll ask her.

The problem that I think that I have, and I think probably the members of the committee will have, that there still seems to be some confusion with regard to the reorganization plan of 1980, with regard to the letter that you presented or have testified about stating what the authority is, and OIA's generic authority in and of itself that creates their activities.

I, for one, am concerned that the Commission members should be involved in determining whether a matter dealing with the Commission itself is significant enough to ask OIA to look into it. If somebody was investigating me, I'd say that's not very significant; don't do anything. I think that's almost the situation that I'm hearing, that you said you would like to look at it and see whether it's significant enough to be handed over to OIA.

Mr. ZECH. No, what I was trying to visualize is this assume that I get a report from the Director of OIA herself, that one of the Commissioners' offices or something like that has a problem that perhaps should be investigated. Or I get it from somewhere else. My first inclination would be to discuss with OIA, "Is there any knowledge of this? What do you know about this? What do you think is the appropriate avenue? Do you think you have the authority? Do you think you have the capability to investigate this particular matter?" If it's a very insignificant or small matter that looks like it might even be frivolous or something like that, perhaps I can see where the Director of OIA may feel confident that she herself should investigate that. On the other hand, if it's a rather significant event, a significant allegation, it may be something that should be elevated.

Senator BREAUX. Well, two points here. Who determines whether it's significant or not?

Mr. ZECH. I think that the Chairman would have a significant role in that determination. I would feel it would be my responsibility to determine significance.

Senator BREAUX. Okay. I'm not sure I agree with that, but the second point. Suppose it's not OIA that brings it to your attention? Suppose it's somebody on your staff? Or suppose it's somebody from outside the NRC? How should it be handled then? Is it the Commissioner's responsibility to determine whether this is significant enough to ask OIA to be brought in? Or do you tell that person, "Go talk to OIA"?

Mr. ZECH. No, no. Well, it just depends, of course, how it comes to us, Mr. Chairman. And that's important, how it comes to us. But if it comes to us from an outside source, one of the staff members or something like that, I think the appropriate office to consult first would be OIA. That's their responsibility, to investigate NRC employees. If the allegation concerns an NRC employee, I think it's appropriate that OIA becomes involved. From then on, you would determine the significance. And when I say that I would determine it, I would do so in consultation with my fellow Commissioners. We make the policy collegially. But it seems to me that it does depend on the significance of the allegation, and OIA should be consulted. Perhaps the General Counsel should be consulted, too, before we proceed at all.

Senator BREAUX. My main concern is the potential for having these things short-circuited by the people who in fact are being investigated because of them deciding that this is not significant.

Mr. ZECH. I understand that. And I'm saying, Mr. Chairman, that I think that our present policy that has been reviewed would address the concern that you have. I do feel that we have tried to be very explicit to say that not only are Commissioners' assistants and staff subject to OIA responsibility, but the Commissioners themselves.

Senator BREAUX. But the Commissioners themselves are not OIA. You are not the investigators who investigate yourselves. And my concern is that if we're going to have a body that looks at the internal operations of the NRC, the NRC shouldn't determine whether the complaints are significant or not to justify an investigation. That's what cries out, in my opinion, for an independent Office of Inspector and Auditor. We can't make the decisions as to whether something is significant enough for us to be investigated. You say that's not what you're saying, but what I hear you say is, We should look at it and see whether it's significant or not. If it's not significant enough, it's never going to get to OIA. And that's what I'm hearing.

Mr. Carr?

Mr. CARR. I think the distinction here is between the investigatory responsibility of OIA and the disciplinary authority of the Commissioner or the Commissioners. The way I read the General Counsel's piece of paper is that all of us, Commissioners and everybody, are under the investigative responsibility of OIA; but once that investigation report is handed out, then it's up to the individual Commissioner, if it's his personal staff, or to the Commission—I don't know how they would handle that—to take care of the disciplinary responsibility. But the investigatory responsibility—the way I read his paper, all of us come under the investigatory responsibility since we are all "employees" under that definition.

Senator BREAUX. Mr. Bernthal?

Mr. **Bernthal.** Mr. Chairman, I do not know of a single case—if there have been any that have come to the Chairman's attention, I'm unaware of them—where an allegation has been made against a Commissioner's office directly to OIA by any member of the agency, by anybody outside the agency, where either the Commission or, I would assume, the Chairman, has suggested that OIA not pursue that allegation. Now, you can inquire of the Director of OIA, but my understanding is that there has never been such interference when an allegation is lodged with OIA. And in this single incident——

Senator **Breaux.** That's not the problem I had. If it's lodged with OIA, that's fine. I'm concerned about it coming to the attention of the Commissioner and never getting to OIA, and the Commission determining whether in fact it should ever get there, instead of just sending them all down there and saying, "Hey, look, I don't know what this is about, but here's something; you go check it."

Mr. **Bernthal.** And in fact that single incident, which is a painful experience for all of us, there is no question that but for the fact that the allegation was never formally lodged with OIA, that investigation would have been carried out by OIA as well. But my understanding is that there was never a formal complaint lodged with OIA by anybody.

Senator **Breaux.** Right. And why? Because the Commission stopped it, which is the problem I'm trying to get at.

Gentlemen, we have some additional questions that are more of a technical nature that we will be submitting to the Commission members and asking you to respond to.

Senator **Breaux.** I appreciate your all being here and I thank you for your testimony.

At this time we would again like to welcome up Mr. Vic Stello; he's the Executive Director for Operations, and Ms. Sharon Connelly, who is Director, Office of Inspector and Auditor, and we look forward to receiving your testimony.

Mr. Stello, we welcome you back again. We are pleased to receive your testimony on this issue.

STATEMENT OF VICTOR STELLO, JR., EXECUTIVE DIRECTOR FOR OPERATIONS, NUCLEAR REGULATORY COMMISSION

Mr. **Stello.** Thank you, Mr. Chairman. And if it's permitted, I would ask you to incorporate my testimony into the record and I would just briefly make a few points.

Senator **Breaux.** Without objection.

Mr. **Stello.** I think a great deal has already been covered that deals with the operation of OIA and the differences between OI and OIA. The points that I want to emphasize with respect to OIA are quite different than the emphasis that I put on investigations of OI this morning.

I couldn't state strongly enough the need for independence, and to be completely removed organizationally from the staff where the bulk of the people that the office is responsible for reside that eventually could be subjected to an OIA investigation. So the idea from an organizational point of view, to make them completely and totally independent of the staff, is valid. I believe that the organization as it exists today, in fact, meets that requirement.

As you have heard, there have been a number of audits and investigations related to activities of the NRC, principally a large number of them being with operations for which I am responsible, and I think you will see from the data in the record a large number of recommendations on how to improve the program where we have indeed made mistakes and had not done things as well as we ought to, in a fiscal sense as well as a programmatic sense. And these recommendations have come to us; the bulk of those we have, in fact, agreed with and implemented. We, in turn, are subjected to subsequent reaudits to affirm that those recommendations we indicated we would implement we, in fact, did so.

I am quite satisfied and pleased with the activities of the office as a general principle. I am aware and recognize that there are a few particular issues that have been given considerable attention, in which there was considerable media interest, and both of those particular cases—which were the subject of the report we referred to earlier this morning—are still under investigation by independent counsel of the agency. With respect to the final outcome on those matters, we will have to wait until that investigation is completed to determine if in fact those particular issues were, in fact, flawed.

Be that as it may, I would make one final recommendation to Congress and to you, Mr. Chairman, that whatever decision Congress chooses to make on this issue, that I think that decision ought to be made on the entire record of the performance of that office, not on a few isolated cases which are still outstanding. I think the overall record of that office has been one that has been good, and I find that they are providing the kind of service that I would expect either an Inspector General or the present Director of the Office of Inspector and Auditor to perform, and I am not aware of any major problem or shortcoming with that office.

That concludes my summary, Mr. Chairman, and I am prepared to answer questions. Senator Breaux. Thank you.

Ms. Connelly?

STATEMENT OF SHARON R. CONNELLY, DIRECTOR, OFFICE OF INSPECTOR AND AUDITOR, NUCLEAR REGULATORY COMMISSION

Ms. Connelly. Yes. I will summarize my full statement, which has been provided for the record.

Mr. Chairman, I appreciate the opportunity to appear before you today to discuss the NRC's Office of Inspector and Auditor, OIA, and the proposed legislation to establish an Inspector General at the NRC.

As you requested in your letter of invitation, I will discuss the adequacy of OIA's organization and structure, as well as its resources; in doing so, I will compare and contrast OIA with the statutory offices of Inspectors General.

I believe the Commission's existing organization and structure for the conduct of internal investigations and audits are adequate. OIA is organized and operates very much like a statutory Inspector General. The Director, OIA, like the statutory Inspectors General, reports to the agency head which, in the NRC, is the five-member Commission. OIA has audit and investigative units that are charged with identifying fraud, waste and mismanagement and promoting the effectiveness and efficiency of NRC programs. I believe there are no organizational impairments to the effective and efficient operation of OIA.

I also believe we have the resources needed to carry out our responsibilities. We have been allocated 26 full-time equivalent positions. Our current on-board professional staff consists of 7 investigators, 13 auditors, a computer specialist and a nuclear engineer.

During my-year tenure as Director, OIA, I have had full access to the Commission. I routinely provide briefings to the Chairman on significant OIA activities. The Commission periodically requests briefings on audits and investigations which relate to safety issues affecting near-term operating licenses and other matters requiring Commission decisions. I have found the Commission, as a whole, to be supportive of OIA's activities and responsive to our findings.

OIA's mission is the same as the statutory Inspectors General. We carry out our responsibilities in accordance with the same professional standards for auditors and investigators that are followed by the statutory Inspectors General.

The statutory Inspectors General are Presidential appointees, confirmed by the Senate. The Director of OIA is appointed by the Commission. It is my understanding that, in the past, the NRC has used substantially the same criteria to make selections for the position of Director, OIA, as are used for appointing statutory Inspectors General.

While OIA does not have the statutory protection of independence, there is no interference by the Commission with the operations of the office. The Commission may occasionally direct OIA to conduct an audit or investigation, but there are never any limitations, restrictions or other impairments placed by the Commission on the conduct of our assignments. Furthermore, since I have been Director the Commission has never directed OIA to terminate an assignment. The Commission structure is such that it is impossible for any one Commissioner to interfere effectively with OIA's activities; and from a practical standpoint, I believe it would be highly unlikely that a majority of Commissioners would attempt to influence improperly the outcome of an internal audit or investigation.

Consistent with the Inspector General concept, OIA works cooperatively with various organizations in the NRC to accomplish our mission, except when such a relationship would compromise our independence. For example, we serve as technical advisors to the agency in such areas as financial management systems and internal controls.

Most of our audits and investigations involve programs or people under the direction of the Executive Director for Operations, or EDO. The EDO or his staff frequently refer matters to us for review or investigation. The EDO is highly responsive to our recommendations and ensures the full cooperation of his staff in providing information or assisting in our audits or investigations. There have been times when the EDO disagreed with our recommendations; we have escalated these differences, as appropriate, to the Commission for resolution in accordance with the requirements of the Office of Management and Budget. I find that the EDO responds quickly to items that I bring to his attention.

There are some minor differences between OIA and the statutory Inspector General offices. First, OIA does not have subpoena authority; however, we can request the Commission to issue a subpoena on our behalf. Second, the statutory Inspectors General review existing and proposed legislation and regulations for their impact on economy and efficiency and their susceptibility to fraud and abuse. While OIA reviews the implementation of existing legislation and regulations in the course of our ongoing assignments—and suggests changes where needed—we do not review proposed legislation and regulations on a regular basis. Third, OIA does not issue a semiannual report to the Congress as do the statutory Inspectors General, but we do issue an annual report of OIA activities to the Commission that is provided, upon request, to the Congress.

I believe we have made significant strides in the management and operation of OIA in the past three years. We have added a nuclear engineer to our staff to broaden our capability to identify and analyze technical and safety issues. We have also occasionally requested and received engineering and ADP assistance from the agency to augment our audit and investigative capability. On some assignments, we have initiated a team approach using auditors, investigators, ADP, and technical personnel to conduct major reviews when important safety questions were at issue, and the Commission needed a timely and thorough assessment of NRC staff conduct to make licensing and regulatory decisions. We have obtained the computer equipment and software which allows us to accumulate and analyze a much greater amount of data in a significantly shorter period of time. We have developed a comprehensive management information system, and we have established formal training programs for our employees to enhance their audit and investigative skills.

In the past 3 years we issued 51 audit reports. Additionally during these years, we issued 56 reports following up on prior years' recommendations. We made 258 audit recommendations for corrective action to NRC management during this 3-year period; 241 of those recommendations were accepted by NRC management for implementation. We issued 132 reports of investigation and inquiry and addressed 30 matters that were closed to the file after preliminary review.

While I strongly support the Inspector General concept in the Federal Government, I have one serious reservation about a statutory Inspector General in the NRC. It has been my experience that the Commission, in order to make certain policy and licensing decisions, needs an independent office it can occasionally direct to review certain actions of the NRC staff. For example, prior to making licensing decisions the Commission has a need to know whether there are any indications of NRC staff misconduct which may impact on safety. To accommodate the Commission's requirements, OIA closely monitors upcoming licensing decisions and adjusts its priorities to obtain the information the Commission needs, in the time frame needed, to avoid delays in licensing decisions.

OIA has an obligation to respond timely to the Commission's needs. It is not clear that a statutory Inspector General would have the same obligation. While I understand that statutory Inspectors General and management pursue the same objective—that is, the efficient and effective operation of programs—statutory Inspectors General also function as part of the agency head's senior management team; thus it is not at all clear that a statutory Inspector General in the NRC would be required to adjust priorities and respond to the Commission's need for safety-related information.

The Inspector General Act of 1978 provides that the agency head shall not prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation. This implies that, given an environment of limited resources, the Inspector General—not the Commission—would determine the Inspector General's priorities when differences of opinion arise over which audits and investigations should be conducted. It has been my experience that the Commission, with its broad base of technical support, is in a better position than OIA or a statutory Inspector General to assess the safety significance of allegations affecting the Commission's licensing and regulatory decisions and any accompanying need for quick resolution.

In the event a statutory Inspector General is not forthcoming in the NRC, there are two changes I would propose to improve the effectiveness of OIA. The first is to change OIA's name to the Office of Inspector General. A number of non-statutory audit and investigative offices carry this title, which is more easily recognized by those who have allegations to report. The second proposal is to require investigations of senior OIA officials to be performed by persons outside the NRC. This would ensure OIA employees are not investigated by the same persons they have audited or investigated.

Lastly, there is proposed legislation to place the NRC's Office of Investigations, or OI, in a statutory Inspector General office. I do not believe OI should be included in the NRC's internal audit and investigative office. Similar to the EDO's mission, OI's function is essentially one of regulatory compliance; that is, it investigates allegations of willful or intentional violations of NRC requirements. Because of the complimentary nature of their missions, OI and the EDO must work closely with each other. The close working relationship between OI and the EDO's staff could present a serious problem to an Inspector General office. It would be impossible to maintain a close working relationship with the EDO staff on one hand, and audit and investigate them on the other. The appearance of objectivity and independence would be shattered.

This concludes my statement. I would be pleased to answer any questions that you have.

Senator BREAUX. Thank you both for your testimony.

Ms. Connelly, do you think that the potential for the Commission restricting your office's investigative activities exists?

Ms. CONNELLY. The potential is there. Theoretically, the Commission can direct the Office of Inspector and Auditor to initiate or terminate an assignment. From a practical standpoint, I don't think the Commission would require the Office of Inspector and Auditor to terminate an assignment.

Senator BREAUX. What do you think about what I perceive to be the Chairman's suggestion in his statement that the Commissioners have the authority to review any alleged activities that may need to be investigated to determine some kind of a threshold as to whether it's serious enough to warrant an OIA investigation about it?

Ms. CONNELLY. The question of thresholds with respect to OIA has not been addressed by the Commission.

Senator BREAUX. No, but it was just addressed a minute ago when Chairman Zech testified. He said, "as relates to Commission activities," I interpret that to mean he thinks it's appropriate to determine whether something merits further investigation or not.

Ms. CONNELLY. From an actual standpoint, I don't take issues to the Commission for their determination as to whether or not a matter involving them should be investigated.

Senator BREAUX. You have no problems with that?

Ms. CONNELLY. The Chairman is under an obligation to share with the other Commissioners any information that he has regarding the agency's operations. There's a collegial responsibility. And if I have an allegation involving another Commissioner and I take that to the Chairman, the Chairman is obliged to share that with the other Commissioners, including the Commissioner against whom the allegation has been made.

Senator BREAUX. Do you agree with that as the policy?

Ms. CONNELLY. I don't disagree with that policy; but the fact is, I don't take allegations to the Chairman about other Commissioners until I've reached the point in the investigation where I believe it's appropriate to share with the Chairman.

Senator BREAUX. The point I'm concerned about is any allegations of misconduct by Commissioners or by their staff, or by NRC employees. Do you think the Commission should have the authority, before they ever reach you, to make a determination that they shouldn't be presented to OIA because they're not serious enough, because they're frivolous, or for whatever reason?

Ms. CONNELLY. I think the Commission has decided the question that all allegations of misconduct involving Commissioners should be referred to my office. And if those allegations are not referred to my office, then they should be referred to the appropriate investigatory body, and that would be the FBI, if not OIA.

Senator BREAUX. Do you think that anything needs to be done legislatively to ensure that that is the way it is carried out? Or do you think that whatever existing authority is out there clearly spells that out? Because a reorganization plan of 1980 apparently was used at one time by some to say that OIA will never get this. And we have a letter, apparently, that the Chairman indicated, changed that directive, and we have your general authority of the NRC sitting out there in addition to that. Do you think it's clear enough? Or do you recommend that we take a crack at changing it and clearing it up legislatively?

Ms. CONNELLY. I think the policy is clear. I have no problem with the policy. I also think that's a legal question that I'm probably not qualified to answer.

I would like to, if I may, speak to the one incident that we're aware of where an allegation involving a Commissioner was taken to the Chairman. The Office Director who took that allegation to the Chairman was required, under both the NRC manual and the NRC regulations, to provide that information to my office. And because of the collegial responsibility of the Chairman to share that information with the other Commissioners, the Office Director should not have taken that information to the Chairman. It should have come either directly to my office or, if there was some feeling on the part of that Office Director that my office couldn't handle the matter, then he had the personal option of taking it to the Department of Justice.

Senator BREAUX. Didn't you just indicate, however, that it's your responsibility to take matters to the Commissioner yourself that are being investigated that may involve another Commissioner?

Ms. CONNELLY. According to the regulations, the matter should have been referred to my office.

Senator BREAUX. But don't you, in fact, refer these matters that may involve another Commissioner back to the Chairman of the Commission?

Ms. CONNELLY. Not until it is appropriate to share the information without compromising the investigation.

Senator BREAUX. At what point does that occur?

Ms. CONNELLY. Generally, after the individual against whom the allegation has been made has been interviewed, or when they are about to be interviewed. It's almost a simultaneous occurrence.

Senator BREAUX. How are you appointed?

Ms. CONNELLY. I am appointed by the Commission.

Senator BREAUX. Does that not create a perception of a problem for those who would argue that OIA, which investigates the office itself, should not be in effect hired by the office that it is required to look at for any possible wrongdoing? It doesn't intimidate you in any way? Or you don't feel that, "Well, I'm working for them, so I really shouldn't be too tough on them because, after all, they hired me and they can fire me"?

Ms. CONNELLY. That has never intimidated me. And the fact that I have initiated 10 investigations of the Commission in the past 3 years I think is evidence of that. In one of those investigations we called in the FBI because we needed the additional capability.

So no, sir, I am not intimidated; and if I were placed in the position where I felt that I couldn't effectively carry out the investigation, then I would refer the whole investigation to the FBI or to the Department of Justice.

Senator BREAUX. Do you, for instance, have to have your testimony before this committee cleared by the NRC before you present it? Does the Office of General Counsel kind of look at it and sign off on it, or not?

Ms. CONNELLY. No, sir. I was under no instructions to provide the testimony for clearance. I provided it as a matter of courtesy.

Senator BREAUX. Did you get any comments from them about it?

Ms. CONNELLY. Yes, sir. They said they thought it was excellent testimony.

Senator BREAUX. You're not obligated to do so by any rule or regulation or memorandum of understanding between you and the Commission?

Ms. CONNELLY. With respect to——

Senator BREAUX. The clearance of testimony, things of that nature.

Ms. CONNELLY. There may be, but I'm not aware of any.

Senator **Breaux**. Mr. Stello, I'm interested in your thoughts about the interaction between Ms. Connelly's shop and the Office of Investigations as to how it is working, because obviously it seems—at least, to this Member—that if you're going to have wrongdoings within the department that deal with licensees, for instance, or any of the operations of the Commission, that it's very difficult to separate that wrongdoing from wrongdoing that affects the health and safety of the general public; i.e., if an inspector is doing something wrong, I can't imagine because of the sensitive nature of that inspector's job that it does not always affect the health and safety of the general public if that person is doing something wrong.

Is there a clear line as to how these cases get referred from OIA over to OI or back from the Office of Investigations to OIA? Is there a clear enough line? It seems to me that these things overlap and that we've got some real potential problems out there. Mr. Stello, give me your perspective of it.

Mr. **Stello**. I don't see overlap. Each office knows exactly what their responsibilities are; but inevitably, when you do an investigation, there is the potential during that investigation—if it's of a licensee, or an allegation of wrongdoing by an NRC inspector or another NRC employee—if that happens, OI knows to provide that information to OIA for them to investigate that matter. In a similar fashion, if OIA is doing an investigation, they may learn something in their investigation that suggests OI needs to look into a matter, and they in turn make that information known to OI. Both of those offices know that the responsibility for protecting the health and safety of the public resides with the staff, and if either office finds any issue for which there was a question raised about the safety of an operating facility of any type, they immediately inform my staff so that we can take an appropriate regulatory action.

I think the lines of responsibility are very clear and very sharp as to what responsibilities fall within each of the offices, and I see that distinction made very clearly.

Senator **Breaux**. Ms. Connelly, you had a comment on that?

Ms. **Connelly**. Yes. I have no trouble with the distinction. I think it is a very clear distinction. Any time we receive information during the course of our audits or investigations that would fall under the jurisdiction of the Office of Investigations, we immediately refer it.

In the last 2 years we referred ten matters to the Office of Investigations that we uncovered in our assignments. The same thing is true with respect to safety issues. Any time we identify a potential safety issue we immediately refer that to the EDO's office for resolution. In the past 2 years, we have referred 12 matters.

Senator **Breaux**. As a practical matter, suppose a hypothetical situation where you have an NRC employee—totally hypothetical—that may be engaged in wrongdoing with a licensee employee, and the activity potentially affects the health and safety of that particular plant. So you have an internal NRC employee who is up to no good; maybe he is on the take from a utility employee to overlook some major safety violations. Hypothetical situation but one that, of course, is possible.

How would the NRC handle that? Is it OIA? Is it OI? Is it both? Do you work together? How is that handled?

Ms. **Connelly**. We work together. We share information. If we complete our investigation first, we provide our report to OI. We receive information that OI has that bears on our investigation.

Senator **Breaux**. Have you ever had situations like that, from a practical standpoint, that you can look back on and say, "I wish we could have done it differently than this"?

Ms. **Connelly**. I don't have any situations that I can look back and say that I wish we had done it differently. But we've identified about 17 instances where both offices were interviewing the same witnesses about their respective areas of responsibility.

Senator **Breaux**. Why do you feel—if in fact you do feel—that OIA should not be taken out of the umbrella of NRC and established as a completely, totally outside investigative arm to audit and investigate the NRC itself? Why is that a bad idea?

Ms. **Connelly**. I don't think it's a bad idea. As I said in my testimony, I strongly support the statutory Inspector General concept. The one concern I do have, however, are those cases that we're responsible for that impact upon the public health and safety. The Commission does now have the authority to ask us to reassess our priorities and give those cases that are important to the Commission from a safety standpoint priority attention. I'm not sure the Commission would have that same ability with a statutory Inspector General.

Senator **Breaux**. Well, I guess I was talking about an outside Inspector General that would handle the functions of OIA, that would be looking at the operations of the NRC staff personnel, the internal operations of the NRC, not talking about the Office of Investigations functions dealing with licensees.

Ms. **Connelly**. I am speaking of internal investigations. In fact, the bulk of our work deals with safety-related matters. Many of our allegations are that NRC employees are not carrying out their regulatory responsibilities in an appropriate manner.

Senator **Breaux**. All right.

There is a bill pending in the Senate, S. 908. Do you support that or not?

Ms. **Connelly**. I support it.

Senator **Breaux**. As it relates to what it does to OIA, not to anything else.

Ms. **Connelly**. Only with respect to—I still have that concern, that we do conduct safety-related investigations, and the Commission is going to lose control over assigning priorities to those cases that are of particular importance to their decision-making responsibilities.

Other than that, I don't think there's going to be much difference. I think we operate like a statutory Inspector General. I really see very little difference in the way our office operates now and the way a statutory Inspector General will operate. As long as there's the Commission structure, it's virtually impossible for the Commission as a body to influence our audits and investigations, so we really don't have the concerns from an independence standpoint that you would have in an agency with a single administrator. My views may well change if there's a single administrator in the NRC.

Senator **Breaux**. Well, the Commissioners apparently certainly have the opportunity to short-circuit any case that may ever reach OIA. I guess your position is that after it reaches OIA, they can't interfere with your activities. But they certainly have the potential to not let a potential wrongdoing or a case of wrongdoing ever get to OIA by short-circuiting it and saying, "We'll look at it ourselves."

Ms. **Connelly**. I think they can do that with a statutory Inspector General as well. The statutory Inspector General has a recourse to complain to the Congress about it.

Senator **Breaux**. Well, it's something that we definitely have to sort out and work out because if there's anything that we should not allow, it's any agency that is subject to scrutiny this way somehow, in and of themselves, determining which matters are going to be investigated and which matters are not going to be investigated. How we correct that, I'm not absolutely certain at this time. The fact that it has to be corrected is, I think, very, very clear.

Comanche Peak, I cannot understand. From what I read—and I know it's under investigation, but the handling of this thing—we've got investigators that have investigated investigators that have investigated other investigators that have had Mr. Stello participate in it; we have had commissions formed, findings submitted, other commissions formed and submitted. Is this not a classic example of a monumental mess-up? I read the facts, it's incredible. Is there something that I am missing? Can the investigation be that bad?

Ms. **Connelly**. I think our investigation of Comanche Peak was a responsible investigation. Of course, this is all under investigation at this point, and my views——

Senator **Breaux**. That's what I mean. Everybody is investigating everybody else. It seems to me that we've got allegations of investigators telling investigators to change their investigative reports. We have investigators telling investigators that they didn't like their conclusions and to rewrite it. To me it seems like a circle, and we're all going around biting each other on the rear end. It doesn't look very good from where I sit. Maybe I'm looking through the wrong glasses, but looking back at what you know now, how would you have done it differently? And please don't tell me it would have been done the same way.

Ms. **Connelly**. We did a responsible investigation, I believe. We reviewed the investigation responsibly from a management standpoint. The investigator approved all suggested changes to his report. He signed the report. There was never any indication that the investigator did not agree with the report as it was issued until he testified earlier this year.

Senator **Breaux**. Of the whole thing, in January of this year the Commission approved the formation of the Comanche Peak Report Review Group, and that report was issued in March. Since that report has been completed, the Commission has requested yet another assessment of the events, really, surrounding the same thing that that commission was requested to investigate. Is that not correct?

Mr. STELLO. No.

Senator BREAUX. What's the situation, Mr. Stello?

Mr. STELLO. Well, let me speak to the two points.

The first group, under the direction of Mr. Arlotto, was to go in and understand everything that the comprehensive investigation done by OIA revealed. That is, were there any particular safety issues that were not adequately handled? If so, identify them and get them on a track so that we can make sure that every issue was properly disposed of. They also looked at a variety of other specific things, which I think are details and you already have that report.

I believe—and I am satisfied—that the work of that group was thorough, comprehensive——

Senator BREAUX. You're talking about the Arlotto group?

Mr. STELLO. Yes; and it did the job and did it well. The Commission, however, after the Glenn hearing, because of the accusations that were made that involved manipulation of the original OIA report, its adequacy—there was an issue as to whether or not I pressured the investigator or I pressured Ms. Connelly into hurrying the investigation—those are issues which I think the Commission rightfully has asked the question, "All right, where do I get an answer? Was that the case?" To me, it doesn't make any difference if that was done by an Inspector General or whomever. When those kinds of questions get raised, you clearly have to go to an outside, independent counsel to get an answer to that question. And the Commission, in my view, properly did so, and I think until that investigation is complete we will not know the answer.

But the suggestion that any of these other particular activities were not required, they were, and they got a lot more visibility. Once Congress gets interested in an issue it tends, obviously, to create a great deal more publicity just by the nature of itself. But if this were any other investigation and we found these kinds of issues we were faced with, we task people with looking into what this investigation told us and what kind of corrective action is needed. It's proper for us to do that, and that's generally what we do.

This was a very substantial investigation and required a massive effort because of its size; hence, we had to form a special group to do it.

Senator BREAUX. Ms. Connelly, you mentioned in your answer about the investigator or inspector signing off and agreeing. Were you talking about Mulley's testimony?

Ms. CONNELLY. Yes, sir.

Senator BREAUX. Is there any indication anywhere in writing that that's correct, that he agrees with the last report that was submitted?

Ms. CONNELLY. He signed the report, sir. There were no changes made to that report that were not submitted to him first for his review and approval; and if he did not agree with making the change, the change was not made.

Senator BREAUX. So you're saying that when Mulley signed the report, any and all changes were incorporated in the document that he signed?

Ms. CONNELLY. Yes. I'm not sure I——

Senator **Breaux**. I'm saying that when he signed the document, the last inspection report, that any changes and all the changes that were incorporated in there were in that last report which he in fact signed?

Ms. **Connelly**. Yes, sir.

Senator **Breaux**. Okay.

Ms. **Connelly**. Yes, sir.

Senator **Breaux**. Because I'm going to ask some of them to testify, so I want to make sure that we understand what you're saying.

Ms. **Connelly**. All changes—all suggested changes to that report, whether those suggested changes were made by the reviewers or whether they were made by myself or my Deputy Director, were submitted to Mr. Mulley for his review and approval before making them in the report. And he did sign the final report. It was my understanding that he was in perfect agreement with everything that was in that report. He either wrote it, or he reviewed and approved it.

Senator **Breaux**. Okay. All right.

Mr. Stello, can you give me an update on where we are with the whole Comanche Peak thing? Where are we? What's the latest as far as the status of it? When are we going to find out exactly what transpired?

Mr. **Stello**. Well, I have a part of the answer, and that is that I was given agreement to release all of the information so that the staff could start to do the kinds of recommendations that came out of the Arlotto report, and all of those are presently underway. So the activities that we needed to accomplish based on that report are now, as of a few weeks ago or maybe a month or so, are now underway. And we had agreement with the independent counsel that it was okay to do that.

With respect to when the independent counsel will finish, I have no idea.

Senator **Breaux**. Do you have a ball park? I mean, are we talking about 6 months, a year?

Mr. **Stello**. I have been around investigators long enough to know that any guess would probably be wrong, so I'll pass, if I may.

Senator **Breaux**. I'm certainly not here to prejudge it because obviously I don't know it. But it just seems to me that we really had an awful lot of our own investigators doubling up and investigating each other on this. We had some very serious conflicts and accusations that are just, really, very, very difficult to appreciate and certainly impossible to accept as to how it should be run. I mean, that is a given. It's just very, very disturbing and I'm not sure how we correct that.

Okay. We have some additional questions that we'd like to submit, Ms. Connelly, to you, I know, and to Mr. Stello in the context of both of these.

Senator **Breaux**. With that, this panel would be excused for now. Thank you very much.

Ms. **Connelly**. Thank you, sir.

Senator **Breaux**. Mr. Mulley, we appreciate your coming and being with us. What I'm trying to do is get a handle on the process by which investigations like Comanche Peak, and all investigations in general, are handled and the freedom that people have to conduct their activities within the NRC and within the boundaries that are set and whether those boundaries in fact cause any potential problems.

You've been with us and you've heard some of the testimony. I guess my question to you is, based on what you heard and your understanding of how things have transpired, are you in agreement with everything that was done in the reports that you signed?

STATEMENT OF GEORGE MULLEY, ASSISTANT DIRECTOR OF INVESTIGATIONS, NUCLEAR REGULATORY COMMISSION

Mr. **Mulley**. Yes, sir, essentially I am. If we're talking specifically about Comanche Peak. I stand by the testimony I gave earlier in April.

By way of some explanation and a little bit more detail, as the report was being processed I had some disagreements with the way the report was being prepared and put together. I expressed these disagreements to the OIA management staff.

Senator **Breaux**. This is really your report, isn't it? I mean, you provide the facts and information and somebody else takes it and writes up a report that's going to go somewhere?

Mr. **Mulley**. Well, essentially, I did the investigation and I am responsible for writing the report; although, naturally, the OIA management has a managerial responsibility to approve the report and sign the report. It's certainly not a George Mulley report; it's an OIA report. So my reports, as I think would be quite normal, do get submitted to management for review and concurrence.

With the OIA report, everything that I developed through my investigation, all the testimony, was with the report. I disagreed to some extent about the way the report was being prepared. I felt in certain areas we could have been stronger. I think in certain areas, for example the technical issues, I felt that we were overemphasizing the technical issues, especially when I myself—and OIA as a whole—didn't really have the expertise to make any real hard-line calls. I was more interested in how the inspector was being handled out at Region IV and Comanche Peak, and not as concerned about the technical validity of his findings. To me, there was really no excuse if, in fact, as alleged, an inspector was being harassed and intimidated over inspection findings, whether or not at the bottom line he was right or wrong in his inspection finding—there was no excuse for anybody to harass and intimidate anyone in the NRC. Certainly, as pertains to that individual and the possible chilling effect it would have on any other inspector.

Senator **Breaux**. When you were involved in this investigation, were your findings to the effect that in fact some of the inspectors were intimidated or in any way harassed by anybody within NRC?

Mr. **Mulley**. Yes, sir. When I put together my report and I went through the testimonial evidence and what I had gathered, it was my belief that the inspector had been harassed by management as a result of his inspection findings.

Senator **Breaux**. What you're saying is that your concern is that—really, their findings—from a technical standpoint, it wasn't really what you were concerned about. It was whether they were free to do the investigation in the manner in which they should, or whether in fact they were harassed or intimidated?

Mr. **Mulley**. That's correct, sir.

Senator **Breaux**. It's not a question of the merits of what they were looking at; that's for somebody else to decide with the technical——

Mr. **Mulley**. Mr. Stello's staff is certainly the qualified people to look into the technical issues out at Comanche Peak and decide whether they were valid findings or not.

Senator **Breaux**. Your findings on how the investigations were conducted by your investigation—was that made part of your final report, or was that one of the things that you were concerned about being deleted?

Mr. **Mulley**. The original way I had written the report was changed. I later got together with Ms. Connelly and sat down; we came to a mutual understanding. She presented some managerial considerations to me concerning the report and how it should be written. I might not agree with them, but certainly there was nothing wrong in the way she wanted to write the report. It wasn't the way I necessarily would have written it, but there was nothing wrong—illegal or anything like that, or immoral—it was just different from the way I would have wanted it written. We came to an agreement as to how the report would be written. I consented to that, and wrote the report so that it pretty much was going to get out of the office.

I did sign that report. There's nothing in that report that is wrong; it just may not have gone as far as I would have gone, had I had the complete freedom to write and issue the report on my own.

Senator **Breaux**. So I guess your testimony on previous occasions was that on this investigation of an investigator that you were to do, you really had two different departments, if you will, commenting on your report? One was the NRC itself, the Commissioners, and the other was your ultimate boss, I guess, Ms. Connelly, both saying, "Hey, change this; add that; we'd like to emphasize this; don't emphasize that"?

Mr. **Mulley**. No, sir, not if I can recall my testimony. There was no influence by the Commission at all.

Senator **Breaux**. How about from EDO?

Mr. **Mulley**. Mr. Stello wanted the report out. He felt that he had a need to get the report out fast, that there was a crisis down at Region IV; and as a result of that, I started to put the report together quickly. There were certain issues that I decided for the time being not to include in the report I was doing because of a time constraint. But as far as the content of the report, there was no attempt by—Mr. Stello's staff or the Commission—to alter that. He just wanted something that he could work with, and he wanted it quickly.

Senator **Breaux**. All right. Well, this is a never-ending saga on this particular investigation.

How long have you been with OIA?

Mr. **Mulley**. Five years, sir.

Senator **Breaux**. Five years? Has this ever occurred before? Have you ever had to sit down with them and talk about how the report was going to be written, or did you pretty much have freedom to do what you thought was right?

Mr. **Mulley**. Pretty much, the reports would go up and, with some minor editorial changes, the reports were signed and went out. I think this report is an exception.

Senator **Breaux**. All right. Well, we thank you, and the Congress in general thanks you for being helpful in trying to give us some aspects of it that I think need to be addressed. Thank you; I appreciate it.

The Chair would announce that our next hearing on this round would be, I think, set for the 20th. We'll be dealing with regulations of the NRC, and that concludes our testimony for this afternoon. We will stand in recess until the 20th of this month.

[Whereupon, at 3:25 p.m., the subcommittee was recessed, to reconvene on Tuesday, October 20, 1987.]

[Statements and other material submitted for the record follow:]

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UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

April 17, 1987

OGC - no clarification needed. - orally from Peter Crane.. 4/21/87

MEMORANDUM FOR: Chairman Zech
Commissioner Roberts
Commissioner Asselstine
Commissioner Bernthal
Commissioner Carr

FROM: William C. Parler
General Counsel

William C. Parler

SUBJECT: POLICIES AND PROCEDURES FOR OIA INVESTIGATIONS OF COMMISSIONERS AND THEIR STAFFS

This memorandum responds to a request from the Commission for a description of policies and procedures applicable to investigations by the Office of Inspector and Auditor of allegations relating to Commissioners and members of their personal staffs.

I. Are Commissioners and their staffs subject to the investigative authority of OIA?

NRC regulations applicable to the conduct of employees are contained in 10 CFR Part 0 (Attachment A to this paper). 10 CFR § 0.735-3(g) provides:

> The Office of Inspector and Auditor investigates all questions of employees' conduct, fraud, etc., in NRC in accordance with NRC Manual Chapter 0702.

The next question is whether a Commissioner or a member of his staff is an "employee" for purposes of the regulation. That question is answered in the affirmative by 10 CFR § 0.735-4(c), which provides:

> "Employee" means an NRC officer or employee and, insofar as statutory and Executive order restrictions are concerned, a member of the Commission....

This leads to a further question: what is the meaning of the qualification that NRC Commissioners are considered employees

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"insofar as statutory and Executive order restrictions are concerned"? Two quite different possible interpretations suggest themselves. The first is that the quoted language seeks to make clear that all of the Part 0 restrictions on the conduct of employees apply to a Commissioner, since those NRC restrictions (some of which reflect statutory prohibitions) were adopted in accordance with binding OPM regulations which were in turn issued pursuant to a 1965 Executive Order (still in force), E.O. 11222 (Attachment B to this paper). This broad interpretation is consistent with 10 CFR § 0.735-5(a), "Applicability," which states that Part 0 applies "to all current and former NRC employees," without qualification. It is also consistent with the broad reach of E.O. 11222.

Alternatively, the language could be read as limiting the applicability of the regulations, by differentiating between those restrictions derived from statutes or executive orders and those adopted by the NRC as a matter of administrative discretion. Such an interpretation would find some support in the differing origin of the various subparts of 10 CFR Part 0. Subpart B, "Conflict of Interest Restrictions," derives from an executive order and federal statutes, and Subpart C is titled, "Other Restrictions Imposed by Statute on Conduct of Employees", whereas Subpart D is titled, "Restrictions Imposed by NRC Administrative Decision on Conduct of Employees." (Emphasis added.) However, despite its title, Subpart D includes some provisions, such as the prohibition against accepting gifts or decorations from foreign governments, 10 CFR § 0.735-42(e), and the ban on accepting salary from a private source as compensation for services to the Government, 10 CFR § 0.735-40(c), that are explicitly derived from federal statutes, and most of its other provisions, such as 10 CFR § 0.735-41 ("Misuse of Information"), are derived from the OPM regulations that were issued in response to E.O. 11222.

We believe that the more legally sound interpretation is the first -- that Commissioners and their staff are fully subject to the standards of conduct applicable to all other NRC employees, and that OIA has jurisdiction to investigate alleged violations of those requirements. In practice, the difference between the two interpretations is probably slight, since almost all of Subpart D is based on statutes and/or an executive order.

II. What procedures apply when OIA investigates a Commissioner or a member of his staff?

As noted above, 10 CFR § 0.735-3(g) provides that OIA investigates questions of misconduct "in accordance with NRC Manual Chapter 0702." That Manual Chapter (Attachment C to this paper) does not speak explicitly to the question of allegations against a Commissioner or a member of his staff, but it implies strongly that the same procedures are applicable to all subjects of investigation. The second of the two stated "objectives" is:

> To assure that each employee who may be guilty of misconduct or improper action will be disciplined in the same manner as others under similar conditions regardless of his position in the organization.

It should be noted that OIA does not have the power to discipline personnel of other offices. Rather, under 10 CFR § 1.30, it conducts investigations (among other duties), refers suspected or alleged criminal violations to the Justice Department, and "provides reports and recommendations to the Commission on the results of its audits, investigations, and inspections." Under Reorganization Plan No. 1 of 1980, the functions of "appointing, removing, and supervising" the staffs of various Commission offices are assigned to the heads of those offices. Section 1(c) provides that each individual Commissioner has the authority to appoint, remove and supervise the personnel employed in his or her immediate office.

Since OIA does not have disciplinary authority, the quoted provision in the Manual Chapter, if it is to have any meaning at all, must mean that OIA's procedures for investigating alleged misconduct, and for making reports and recommendations about the results of its investigations, must not vary according to the position of the subject employee.

Apart from the quoted language, the Manual Chapter does not offer guidance as to the procedures to be used in investigations of Commissioners or their staffs. Historically, we are not aware of instances in which, in investigations into possible misconduct, the procedures used for Commissioners and members of their staff were different from those used for other NRC employees. We understand from OIA that in several investigations, the same procedures were used by OIA for all persons interviewed, including those in Commissioners' offices.

III. Conclusion

In our view, a Commissioner (and by extension, a member of his personal staff) is an "employee" for purposes of the jurisdiction of OIA to investigate allegations of misconduct, at least to the extent that the actions alleged constitute a violation of restrictions reflected in statutes or executive orders. We have found no basis in existing written guidance to suggest that different procedures apply to investigations of Commissioners or members of their staffs and to other NRC employees. To the extent we have found pertinent guidance, it suggests that all NRC employees are to be treated alike for purposes of OIA investigations.

Attachments:
A. 10 CFR 0.735
B. E.O. 11222
C. Manual Chapter 0702

Attachment A

PART 0—CONDUCT OF EMPLOYEES

Subpart A—General

Sec.
0.735-1 Policy.
0.735-2 Program objective.
0.735-3 Responsibilities and authorities.
0.735-4 Definitions.
0.735-5 Basic requirements.
0.735-6 National emergency application.
0.735-8 Information collection requirements: OMB approval.

Subpart B—Conflict of Interest Restrictions

0.735-20 General.
0.735-21 Acts affecting a personal financial interest (based on 18 U.S.C. 208).
0.735-22 Future employment (based on 18 U.S.C. 208).
0.735-23 Activities of officers and employees in claims against and other matters affecting the Government (based on 18 U.S.C. 205).
0.735-24 Receiving salary from source other than the U.S. Government (based on 18 U.S.C. 209).
0.735-25 Compensation to employees in matters affecting the Government (based on 18 U.S.C. 203).
0.735-26 Disqualification of former officers and employees in matters connected with former duties or official responsibilities; disqualification of partners of current officers and employees (based on 18 U.S.C. 207).
0.735-27 Appearances by former employees before NRC.
0.735-28 Confidential statements of employment and financial interests.
0.735-28a Financial disclosure reports under the Ethics in Government Act.
0.735-29 Restriction against ownership of certain security interests by Commissioners, certain staff members and other related personnel.

Subpart C—Other Restrictions Imposed by Statute on Conduct of Employees

0.735-30 Description of statutory provisions.

Subpart D—Restrictions Imposed by NRC Administrative Decision on Conduct of Employees

0.735-40 Outside employment and other outside activity.
0.735-41 Misuse of information.
0.735-42 Gifts, entertainment, and favors.
0.735-43 Use of Government property.
0.735-44 Scandalous conduct.
0.735-45 Employee indebtedness.
0.735-46 Gambling, betting, and lotteries.

Sec.
0.735-47 Handling of funds entrusted by fellow employees.
0.735-48 Ex parte contacts.
0.735-49 Employment of persons on extended leave of absence from a previous employer with reemployment rights or other benefits with the previous employer.
0.735-49a Other proscribed actions.

Subpart E—Ethical and Other Conduct and Responsibilities of Special Government Employees

0.735-50 Use of Government employment.
0.735-51 Use of inside information.
0.735-52 Coercion.
0.735-53 Gifts, entertainment, and favors.
0.735-54 Miscellaneous statutory provisions.
0.735-55 Applicable standards of conduct.
ANNEX A—CODE OF ETHICS FOR GOVERNMENT SERVICE (5 U.S.C. 7301)

AUTHORITY: Secs. 25, 161, 68 Stat. 925, 948, as amended (42 U.S.C. 2035, 2201); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841); E.O. 11222, 30 FR 6469, 3 CFR 1964-1965 COMP., p. 306; 5 CFR 735.104.

Sections 0.735-21 and 0.735-29 also issued under 5 U.S.C. 552, 553. Section 0.735-26 also issued under secs. 501, 502, Pub. L. 95-521, 92 Stat. 1864, 1867, as amended by secs. 1, 2, Pub. L. 96-28, 93 Stat. 76, 77 (18 U.S.C. 207).

SOURCE: 31 FR 4502, Mar. 17, 1966, unless otherwise noted.

EDITORIAL NOTE: For nomenclature changes to this part, see 40 FR 8774, Mar. 3, 1975.

Subpart A—General

§ 0.735-1 Policy.

(a) The personnel policy of the U.S. Nuclear Regulatory Commission states, in part, that:

> The Atomic Energy Act requires the Commission to assure itself that the character, associations, and loyalty of workers in atomic energy are of a high order. Conduct and self discipline, both on and off the job, must measure up to unusual standards * * *.

(b) Section 735.101 of the Civil Service Commission regulations (5 CFR 735.101), issued pursuant to Executive Order 11222, May 8, 1965, states that:

> The maintenance of unusually high standards of honesty, integrity, impartiality, and conduct by Government employees and spe-

cial Government employees is essential to assure the proper performance of the Government business and the maintenance of confidence by citizens in their Government. The avoidance of misconduct and conflicts of interest on the part of Government employees and special Government employees through informed judgment is indispensable to the maintenance of these standards * * *.

§ 0.735-2 Program objective.

(a) The program objective is to protect the interests of the public and employees by setting forth principles, practices, and standards governing conduct of employees in such a manner that they may be readily understood by the individuals involved and practicably administered by the NRC.

(b) It is expected that the provisions of this part will be observed and administered in a manner which is consistent with both their spirit and their letter.

(c) Of necessity, because of the nature of the criminal statutes and the subject matter involved, this part cannot deal with all of the problems which may arise with regard to the conduct, including conflicts of interest, of employees and former employees.

§ 0.735-3 Responsibilities and authorities.

(a) Employees shall: (1) Comply with the statutes and the rules, standards of conduct, and other regulations set forth in this part.

(2) Consult the full text of applicable statutes as to whether an action in question may in any way violate the statutes.

(3) Be guided in all their activities by the Code of Ethics for Government Service (Annex A).

(4) Conduct themselves in such a manner as to create and maintain respect for the NRC and the U.S. Government and avoid situations which require or appear to require a balancing of private interests or obligations against official duties.

(5) Be mindful of the high standards of integrity expected of them in all their activities, personal and official.

(6) Not give or appear to give favored treatment or competitive advantage to any member of the public, including former employees of the NRC, appearing before them on their own behalf or on behalf of any nongovernmental interest.

(7) Recognize that violation of any of the instructions or statutes referred to in this part may subject them to disciplinary action by NRC in addition to the penalty prescribed by law for such violation.

(8) Discuss with their immediate supervisor, or counselor, as appropriate, any problem arising out of this part.

(9) Report to the Director of their Office all allegations or indications of misconduct, including fraud, graft, corruption, and diversion of NRC assets by NRC or contract employees; however, when the exigencies of the circumstances dictate, employees may make such reports directly to the Office of Inspector and Auditor.

(b) Supervisors: (1) Inform themselves of any problems of their employees arising out of this part, consult with the cognizant NRC counselor as appropriate, and take prompt action to see that the problems, if they cannot be resolved, are referred to higher authority.

(2) Relieve employees from assignments in accordance with § 0.735-22(a).

(c) The Executive Director for Operations assumes responsibilities assigned in §§ 0.735-21(b), 0.735-22(b), 0.735-23 (d) and (e), 0.735-26 (c) and (d), and 0.735-28.

(d) The Directors of Offices and Divisions. (1) Bring to the attention of appropriate contractors under their jurisdiction those provisions of this part (such as "Future Employment"; "Ex Parte Contacts"; "Assisting Former Employees"; "Gifts, Entertainment, and Favors"; "Cancellation of Contracts"; and others) which may affect the actions of a contractor and his employees in dealing with NRC employees.

(2) Report to the Office of Inspector and Auditor all complaints concerning fraud, graft, corruption, diversion of NRC assets by NRC employees or contractors, and misconduct of NRC employees; take action as a result of investigations; and report on action taken, as provided in NRC Manual Chapter 0702, "Notification and Investigation of Misconduct."

(3) Assume responsibilities assigned in §§ 0.735-21(b), 0.735-22(b), 0.735-23(d), 0.735-27, 0.735-28, and 0.735-40(b).

(e) The Director, Office of Administration. (1) Provides a copy of this part to each employee and special Government employee, and to each such new employee at the time of his entrance on duty.

(2) Provides a copy of all revisions to each employee and special Government employee.

(3) Brings the provisions of this part to the attention of each employee and special Government employee annually, and at such other times as circumstances warrant.

(4) Assures the availability of counseling services under paragraph (h) of this section to each employee and special Government employee.

(5) Has available for review by employees and special Government employees, as appropriate, copies of laws, Executive Order 11222, NRC regulations, and pertinent Office of Personnel Management regulations and instructions relating to ethical and other conduct.

(6) Notifies employees and special Government employees at time of entrance on duty and periodically thereafter of the availability of counseling services under paragraph (h) of this section and how and where these services are available.

(f) The Director, Office of Administration, assumes the responsibilities assigned in §§ 0.735-40(b) and 0.735-49.

(g) The Office of Inspector and Auditor investigates all questions of employees' conduct, fraud, etc., in NRC in accordance with NRC Manual Chapter 0702.

(h) The General Counsel. (1) Is the counselor for NRC.

(2) Serves as NRC's designee to the Office of Personnel Management on matters covered by this part.

(3) Designates deputy counselors.

(4) Coordinates counseling services, and assures that counseling and interpretations on questions of conflicts of interest and other matters covered by the part are available to deputy counselors.

(5) Carries out the specific responsibilities assigned in §§ 0.735-27, 0.735-28, and 0.735-49(b).

[31 FR 4502, Mar. 17, 1966, as amended at 40 FR 8775, Mar. 3, 1975; 40 FR 20268, May 9, 1975; 42 FR 20138, Apr. 18, 1977; 44 FR 62881, Nov. 1, 1979; 46 FR 51715, Oct. 22, 1981]

§ 0.735-4 Definitions.

(a) "Commission" means the Commission of five members or a quorum thereof sitting as a body, as provided by section 201 of the Energy Reorganization Act of 1974, 88 Stat. 1233.

(b) "NRC" means the agency established by Title II of the Energy Reorganization Act of 1974 comprising the members of the Commission and all offices, employees, and representatives authorized to act in any case or matter, whether clothed with final authority or not.

(c) "Employee" means an NRC officer or employee and, insofar as statutory and Executive order restrictions are concerned, a member of the Commission, but does not include (unless otherwise indicated) a special Government employee, or an employee of another Government agency assigned or detailed to the NRC.

(d) "Former employee" means a former NRC officer or employee as defined in paragraph (c) of this section, a former special Government employee, as defined in paragraph (e) of this section, a former member of the Nuclear Regulatory Commission, a former member of the Atomic Energy Commission, and a former officer or employee of the Atomic Energy Commission.

(e) "Special Government employee" means an officer or employee of the NRC who is retained, designated, appointed, or employed to perform, with or without compensation, for not to exceed 130 days during any period of 365 consecutive days, temporary duties either on a full-time or intermittent basis. The term includes NRC consultants, experts, and members of advisory boards, but does not include a member of the Uniformed Services.

(f) "Official responsibility" means the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct Government action.

(g) "Organization," as used in this part in connection with 18 U.S.C. 208, means universities, foundations, nonprofit research entities and similar nonprofit organizations, States, countries and municipalities and subdivisions thereof as well as business organizations.

(h) "Person" means an individual, a corporation, a company, an association, a firm, a partnership, a society, a joint stock company, or any other organization or institution.

[31 FR 4502, Mar. 17, 1966, as amended at 40 FR 8775, Mar. 3, 1975]

§ 0.735-5 Basic requirements.

(a) *Applicability.* The provisions of this part apply to all current and former NRC employees and special Government employees. Except for § 0.735-28, the provisions of this part are not applicable to employees of other Government agencies assigned or detailed to the NRC. Employees of other Government agencies assigned or detailed to the NRC are required by § 0.735-28 to furnish a statement of employment and financial interests if they are performing duties of a position specified in § 0.735-28(a). However, an employee of another Government agency assigned or detailed to the NRC is not relieved of his responsibilities under regulations or code of conduct prescribed by his parent agency.

(b) *Cancellation of contracts.* The Commission reserves the right to declare void, in accordance with law, any contract negotiated or administered in violation of the provisions of NRC regulations, or statute.

(c) *Scope of part.* This part incorporates the statutes, the instructions and specific procedures, pertaining to an employee's conduct.

(d) *Construction of criminal or civil statutes.* The paraphrased version of any criminal or civil statute in this part shall not constitute a binding interpretation thereof upon the NRC or the Federal Government.

(e) *Certifications.* Certifications called for by §§ 0.735-23(e) and 0.735-26(c) and (d) shall be submitted for publication in the FEDERAL REGISTER.

(f) *Disciplinary and other remedial action.* (1) A violation of the regulations in this part by an employee or special Government employee may be cause for appropriate disciplinary action which may be in addition to any penalty prescribed by law.

(2) Remedial action, whether disciplinary or otherwise, shall be effected in accordance with any applicable laws, Executive orders and regulations.

(g) *Presidential appointees.* Presidential appointees covered by section 401(a) of Executive Order 11222 shall not receive compensation or anything of monetary value for any consultation, lecture, discussion, writing, or appearance the subject matter of which is devoted substantially to the responsibilities, programs, or operations of NRC, or which draws substantially on official data or ideas which have not become part of the body of public information.

[31 FR 4502, Mar. 17, 1966, as amended at 40 FR 8775, Mar. 3, 1975]

§ 0.735-6 National emergency application.

The provisions of this part continue in effect without modification in a national emergency.

§ 0.735-8 Information collection requirements: OMB approval.

The Nuclear Regulatory Commission has submitted the information collection requirements contained in this part to the Office of Management and Budget (OMB) for approval as required by the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.). In § 0.735-28, OMB has approved the information collection requirements contained in Form NRC-443, under control number 3150-0025.

[49 FR 19623, May 9, 1984]

Subpart B—Conflict of Interest Restrictions

§ 0.735-20 General.

(a) Part I, "Policy," of Executive Order 11222 states:

> Where government is based on the consent of the governed, every citizen is entitled to have complete confidence in the integrity of his government. Each individual officer, employee, or adviser of government must help to earn and must honor that trust by his own integrity and conduct in all official actions.

(b) The elimination of conflicts of interest in the Federal service is one of the most important objectives in establishing general standards of conduct. A conflict of interest situation may exist where a Federal employee's private interests, usually of an economic form, conflict, or raise a reasonable question of conflict with his public duties and responsibilities. The potential conflict is of concern whether it is real or only apparent.

(c) An employee, including special Government employee, shall not: (1) Have a direct or indirect financial interest that conflicts substantially, or appears to conflict substantially, with his Government duties and responsibilities; or (2) engage in, directly or indirectly, a financial transaction as a result of, or primarily relying on, information obtained through his Government employment.

(d) An employee, including a Special Government employee, is not precluded from having a financial interest or engaging in financial transactions to the same extent as a private citizen not employed by the Government so long as it is not prohibited by the law, Executive Order 11222, Office of Personnel Management regulations, or the regulations in this part.

(e) Certain provisions in 18 U.S.C. 201-209, dealing with conflicts of interest in Federal employment are referred to in §§ 0.735-21 through 0.735-27.

[31 FR 4502, Mar. 17, 1966, as amended at 46 FR 51716, Oct. 22, 1981]

§ 0.735-21 Acts affecting a personal financial interest (based on 18 U.S.C. 208).

(a) *General.* Except as permitted by paragraphs (b), (c), and (d) of this section, no employee shall participate personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he, his spouse, minor child, partner, organization in which he is serving as officer, director, trustee, partner, or employee, or any person or organization with whom he is negotiating or has any arrangment concerning prospective employment, has a financial interest.

(b) *Granting of ad hoc exemptions.* (1) If an employee desires to request an exemption from the prohibition of paragraph (a) of this section, he shall fully inform the head of his division or office, as appropriate, in writing of the nature and circumstances of the particular matter and of the financial interests involved and shall request a written determination in advance as to the propriety of his participation in such matter.

(2) The head of his division or office, as appropriate, after examining the information submitted, may relieve the employee from participation in the particular matter and so advise him in writing; or, he may approve the employee's participation in such matter upon advising him in writing:

(i) That he has determined the interest is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such officer or employee, and

(ii) That no provision of law and no regulation in this part would appear to be violated by the employee's participation in the particular matter.

(3) When the head of his division or office believes it is inappropriate for him to make a determination as provided in paragraph (b)(2) of this section, he shall forthwith submit the information with his recommendation through channels to the Executive Director for Operations, who shall make a determination as provided in paragraph (b)(2) of this section, forwarding the original of his determination to the submitting official and a copy to the employee involved.

(4) A copy of each request and response made under the provisions of paragraphs (b) (1) and (2) of this sec-

tion shall be forthwith forwarded through channels to the Executive Director for Operations as a matter of record. Copies of all documents referred to in paragraphs (b) (1), (2), and (3) of this section shall be filed by the holders thereof in their confidential files.

(5) Whenever it can be reasonably anticipated that there will be a need to invoke these procedures repeatedly, and where it also appears that a burden would be placed on the NRC thereby, consideration should be given by the head of his division or office to dismissal or transfer of the employee to another position where the problems will not arise, or to the elimination of the outside interest creating the difficulty. It is expected that the employee concerned will take the initiative in resolving any problem in this area.

(c) *Exemption of remote or inconsequential financial interests.* (1) In accordance with the provisions of 18 U.S.C. 208(b)(2) the NRC has exempted the following financial interests from paragraph (a) of this section and from the requirements of paragraph (b) of this section, upon the ground that such interests are too remote or too inconsequential to affect the integrity of its employees' services:

(i) Financial interests in an enterprise in the form of shares in the ownership thereof, including preferred and common stocks whether voting or nonvoting, and warrants to purchase such shares;

(ii) Financial interests in an enterprise in the form of bonds, notes, or other evidence of indebtedness;

(iii) Investments in State or local government bonds and investments in shares of a widely held diversified mutual fund or regulated investment company, except holdings in mutual investment funds or regulated investment companies dealing primarily in atomic energy stocks;

Provided, That in the case of paragraph (c)(1)(i) and (ii) of this section:

(A) The total market value of the financial interests described in said subdivisions with respect to any individual enterprise does not exceed $1000; and

(B) The holdings in any class of shares, or bonds, or other evidences of indebtedness, of the enterprise do not exceed 1 percent of the dollar value of the outstanding shares, or bonds or other evidences of indebtedness in said class.

(2) Where a person covered by this exemption is a member of a group organized for the purpose of investing in equity or debt securities, the interest of such person in any enterprise in which the group holds securities shall be based upon said person's equity share of the holdings of the group in that enterprise.

(3) For purposes of paragraph (c) (1) of this section, computations of dollar-value of financial interests in corporations shall be by means of:

(i) Market value in the case of stocks listed on national exchanges; or

(ii) Over-the-counter market quotations as reported by the National Daily Quotation Service in the case of unlisted stocks; or

(iii) By means of net book value (i.e. assets less liabilities) in the case of stocks not covered by the preceding two categories.

With respect to debt securities, face value shall be used for valuation purposes.

(4) The dollar value and percentage of financial interests listed above in paragraph (c)(1) of this section shall be computed as of the date on which the employee first participated personally and substantially in any particular matter, within the meaning of 18 U.S.C. 208(a), relating to the enterprise concerned. The dollar value and percentage so computed shall govern during the entire period that the employee participates in the particular matter unless, after the aforesaid date of computation, he, or other person or organization referred to in paragraph (a) of this section, acquires an additional interest in the same enterprise. In the event of such subsequent acquisition, the dollar value and percentage shall be recomputed as of the date of such acquisition. If, in such case, the dollar value and percentage computed exceeds the limitations described in paragraph (c)(1) of this section, the general exemption provided therein

shall no longer be applicable and an ad hoc exemption must be sought in accordance with paragraph (b) of this section.

(d) *Special exemption for special Government employees.* Federal Personnel Manual Chapter 735, Appendix C provides that a special Government employee should in general be disqualified from participating as such in a matter of any type the outcome of which will have a direct and predictable effect upon the financial interests covered by 18 U.S.C. 208. However, that chapter states that the power of exemption may be exercised in this situation "if the special Government employee renders advice of a general nature from which no preference or advantage over others might be gained by any particular person or organization." It is the policy of the Nuclear Regulatory Commission in conformity with the foregoing, to exercise the power of exemption pursuant to 18 U.S.C. 208(b) in such situations. The authority to grant such an exemption is delegated to the NRC official responsible for appointment or designation of the particular consultant or advisor. This exemption is noted on the form NRC-443 by the appointing official for the consultant or advisor concerned, by a statement that the employee "need not be precluded from rendering general advice in situations where no preference or advantage over others might be gained by any particular person or organization."

[31 FR 4502, Mar. 17, 1966, as amended at 44 FR 41424, July 17, 1979]

§ 0.735-22 Future employment (based on 18 U.S.C. 208).

(a) Solicitation, negotiation, or arrangements for private employment by an employee who is acting on behalf of the NRC in any particular matter in which the prospective employer has a financial interest are prohibited. With the authorization of his supervisor, an employee may be relieved of any assignment which, in the absence of such relief, might preclude such solicitation, negotiation, or arrangements.

(b) No employee shall undertake to act on behalf of the NRC in any capacity in a matter that to his knowledge affects even indirectly any party outside the Government with whom he is soliciting, negotiating, or has arrangements for future employment, except pursuant to the authorization of the Commission, its designee, or the Executive Director for Operations, as appropriate, after full disclosure. (See § 0.735-21.)

[31 FR 4502, Mar. 17, 1966, as amended at 40 FR 8775, Mar. 3, 1975]

§ 0.735-23 Activities of officers and employees in claims against and other matters affecting the Government (based on 18 U.S.C. 205).

(a) No employee shall otherwise than in the proper discharge of his official duties:

(1) Act as agent or attorney for prosecuting any claim against the United States, or receive any gratuity, or any share of or interest in any such claim in consideration of assistance in the prosecution of such claim, or

(2) Act as agent or attorney for anyone before any department, agency, court, court-martial, officer, or any civil, military, or naval commission in connection with any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which the United States is a party or has a direct and substantial interest.

(b) A special Government employee shall be subject to paragraph (a) of this section only in relation to a particular matter involving a specific party or parties (1) in which he has at any time participated personally and substantially as a Government employee or as a special Government employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise, or (2) which is pending in the department or agency of the Government in which he is serving: *Provided,* That paragraph (b)(2) of this section shall not apply in the case of a special Government employee who has served in such department or agency no more than 60 days during the immediately preceding period of 365 consecutive days.

(c) Nothing in paragraph (a) of this section prevents an employee, if not inconsistent with the faithful performance of his duties, from acting without compensation as agent or attorney for any person who is the subject of disciplinary, loyalty, or other personnel administration proceedings in connection with those proceedings.

(d) Nothing in paragraph (a) of this section prevents an employee from acting, with or without compensation, as agent or attorney for his parents, spouse, child, or any person for whom, or for any estate for which, he is serving as guardian, executor, administrator, trustee, or other personal fiduciary except in those matters in which he has participated personally and substantially as a Government employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, or which are the subject of his official responsibility, provided that the Commission, its designee, the Executive Director for Operations, or the head of an office or division, as appropriate, approves.

(e)(1) Nothing in paragraph (a) of this section prevents a special Government employee from acting as agent or attorney for another person in the performance of work under a grant by, or a contract with or for the benefit of, the United States when represented by the NRC provided that the Executive Director for Operations shall certify in writing that the national interest so requires. Such certification shall be submitted for publication in the FEDERAL REGISTER.

(2) The special Government employee shall immediately notify the NRC when so designated to act as agent or attorney by his private employer.

(f) Nothing in paragraph (a) of this section prevents an employee from giving testimony under oath or from making statements required to be made under penalty for perjury or contempt.

[31 FR 4502, Mar. 17, 1966, as amended at 40 FR 8775, Mar. 3, 1975]

§ 0.735-24 Receiving salary from source other than the U.S. Government (based on 18 U.S.C. 209).

(a) No employee shall receive any salary, or any contribution to or supplementation of salary, as compensation for his services as an employee of the NRC from any source other than the Government of the United States, except as may be contributed out of the treasury of any State, county, or municipality.

(b) Nothing in paragraph (a) of this section prevents an employee of the NRC from continuing to participate in a bona fide pension, retirement, group life, health or accident insurance, profit sharing, stock bonus, or other employee welfare or benefit plan maintained by a former employer.

(c) Paragraph (a) of this section does not apply to a special Government employee or to an employee of the Government serving without compensation, whether or not he is a special Government employee.

(d) Paragraph (a) of this section does not prohibit acceptance of contributions, awards, or other expenses for training or to attend meetings under the terms of Chapter 41 of Title 5, United States Code. See NRC Appendix 4150.

[31 FR 4502, Mar. 17, 1966, as amended at 32 FR 13651, Sept. 29, 1967]

§ 0.735-25 Compensation to employees in matters affecting the Government (based on 18 U.S.C. 203).

(a) No employee shall, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly receive or agree to receive, or ask, demand, solicit, or seek, any compensation for any services rendered or to be rendered either by himself or another in relation to any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which the United States is a party or has a direct and substantial interest, before any department, agency, court-martial, officer, or any civil, military, or naval commission.

(b) A special Government employee shall be subject to paragraph (a) of this section only in relation to a particular matter involving a specific party or parties (1) in which he has at any time participated personally and substantially as a Government employee or as a special Government employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, or (2) which is pending in the department or agency of the Government in which he is serving: *Provided*, That paragraph (b)(2) of this section shall not apply in the case of a special Government employee who has served in such department or agency no more than 60 days during the immediately preceding period of 365 consecutive days.

§ 0.735-26 Disqualification of former officers and employees in matters connected with former duties or official responsibilities; disqualification of partners of current officers and employees (based on 18 U.S.C. 207).

(a) No employee, after terminating NRC employment, shall knowingly act as agent or attorney for, or otherwise represent, any other person (except the United States) in any formal or informal appearance before, or, with the intent to influence, make any oral or written communication on behalf of any other person (except the United States) to:

(1) Any department, agency, court, courtmartial, or any civil, military or naval commission of the United States or the District of Columbia, or any officer or employee thereof, and

(2) In connection with any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party or parties in which the United States or the District of Columbia is a party or has a direct and substantial interest, and

(3) In which the individual participated personally and substantially as an employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise, while so employed.

(b)(1) No employee shall, within two years after terminating NRC employment, knowingly act as agent or attorney for, or otherwise represent, any other person (except the United States), in any formal or informal appearance before, or, with the intent to influence, make any oral or written communication on behalf of any other person (except the United States) to:

(i) Any department, agency, court, courtmartial, or any civil, military or naval commission of the United States or the District of Columbia, or any officer or employer thereof, and

(ii) In connection with any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties in which the United States or the District of Columbia is a party or has a direct and substantial interest, and

(iii) Which was actually pending under the individual's official responsibility as an employee within a period of one year prior to the termination of such responsibility.

(2) No employee shall, within two years after terminating NRC employment, as specified in paragraph (d) of this section, knowingly represent, or aid, counsel, advise counsel or assist in representing any other person (except the United States) by personal presence at any formal or informal appearance before:

(i) Any department, agency, court, courtmartial, or any civil, military or naval commission of the United States or the District of Columbia, or any officer or employer thereof, and

(ii) In connection with any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties in which the United States or the District of Columbia is a party or has a direct and substantial interest, and

(iii) In which the individual participated personally and substantially as an employee.

(c) No employee, other than a special Government employee who serves for less than sixty days in a given calendar year, having been employed as specified in paragraph (d) of this section, shall, within one year after termination of NRC employment, knowingly act as agent or attorney for, or otherwise represent, anyone other than the United States in any formal or informal appearance before, or, with the intent to influence, make any oral or written communication on behalf of anyone other than the United States, to:

(1) The Nuclear Regulatory Commission, and

(2) In connection with any judicial, rulemaking, or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter, and

(3) Which is pending before the Commission or in which the Commission has a direct and substantial interest.

(d)(1) Paragraph (c) of this section applies to a person employed:

(i) At a rate of pay specified in or fixed according to Subchapter II of Chapter 53 of Title 5, United States Code, or a comparable or greater rate of pay under other authority, or

(ii) In a position which involves significant decision-making or supervisory responsibility, as designated by the Director of the Office of Government Ethics, in consultation with the Commission. Only positions for which the basic rate of pay for GG-17 of the General Schedule prescribed by section 5332 of Title 5, United States Code, or positions which are established within the Senior Executive Service pursuant to the Civil Service Reform Act of 1978 may be designated.

(2) The prohibition of paragraph (c) of this section shall not apply to appearances, communications, or representation by a former employee, who is:

(i) An elected official of a State or local government, or

(ii) Whose principal occupation or employment is with (A) an agency or instrumentality of a State or local government, (B) an accredited, degree-granting institution of higher education, as defined in section 1201(a) of the Higher Education Act of 1965, or (C) a hospital or medical research organization, exempted and defined under section 501(c)(3) of the Internal Revenue Code of 1954, and the appearance, communication, or representation is on behalf of such government, institution, hospital, or organization.

(e) The prohibitions of paragraphs (a), (b), and (c) of this section shall not apply—

(1) With respect to the making of communications solely for the purpose of furnishing scientific or technological information if the following procedures are observed:

(i) The former employee proposing to make the communication solely for the purpose of furnishing scientific or technological information receives prior written authorization from the Executive Director for Operations. The individual shall provide to the Executive Director for Operations a written statement that indicates he or she is a former employee subject to post-employment restrictions under this section, that briefly summarizes the content of the proposed communication, that describes his or her involvement, if any, as an NRC employee on the matter to be discussed, and that certifies the communication he or she desires to make is solely for the purpose of furnishing scientific or technological information; and

(ii) The Executive Director for Operations before deciding whether to authorize the communication shall consult with the counselor or deputy counselor. The primary factor to be considered by the Executive Director for Operations is whether receipt of the scientific or technological information would further the agency's mission.

(2) If the Commission, in consultation with the Director of the Office of Government Ethics, makes a certification published in the FEDERAL REGISTER that the former employee has outstanding qualifications in a scientific, technological, or other technical discipline, and is acting with respect to a particular matter which requires such qualifications, and that the national interest would be served by the participation of the former officer or employee. The Commission under this provision may authorize communica-

tions that are not limited to transmission of scientific or technological information.

(f) A partner of an NRC employee, including a special government employee, shall not act as agent or attorney for anyone other than the United States before any department, agency, court, court-martial, or any civil, military, or naval commission of the United States or the District of Columbia, or any officer or employee thereof, in connection with any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter in which the United States or District of Columbia is a party or has a direct and substantial interest, and in which such employee participates or has participated personally and substantially as an employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, or which is the subject of his official responsibility.

(g) Nothing in this section shall prevent a former employee from giving testimony under oath, or from making statements required to be made under penalty of perjury.

(h) The prohibition contained in paragraph (c) of this section shall not apply to appearances or communications by a former employee concerning matters of a personal and individual nature, such as personal income taxes or pension benefits; nor shall the prohibition of that subsection prevent a former employee from making or providing a statement, which is based on the former employee's own special knowledge in the particular area that is the subject of the statement, provided that no compenstion is thereby received, other than that regularly provided for by law or regulation for witnesses.

(i) If the Commission finds, after notice and opportunity for a hearing, that the former employee violated paragraph (a), (b), or (c) of this section, the Commission may prohibit that person from making on behalf of any other person (except the United States), any informal or formal appearance before, or, with the intent to influence, any oral or written communication to, the Commission on a pending matter of business for a period not to exceed five years, or may take other appropriate disciplinary action. Such disciplinary action shall be subject to review in an appropriate United States district court. The Commission's procedures for implementing this subsection are contained in NRC Manual Chapter 4124.

(j) The Office of Personnel Management has promulgated detailed regulations explaining and interpreting the post-employment regulations set forth in this section. See 5 CFR Part 737.

[46 FR 51716, Oct. 22, 1981, as amended at 50 FR 25698, June 21, 1985]

§ 0.735-27 Appearances by former employees before NRC.

When a former employee proposes to act as agent or attorney before an NRC office on behalf of anyone other than the United States in connection with any of the matters cited in § 0.735-26, he is expected to make known to the appropriate official of the NRC office the fact of his former assignment with NRC. The head of the office or division or employee before whom the former employee appears, before transacting business with the former employee or authorizing employees under his jurisdiction to transact any business with the former employee, shall call the former employee's attention to the restrictions and penalties contained in 18 U.S.C. 207. No NRC official or employee, except the General Counsel, shall offer to the former employee an interpretation of 18 U.S.C. 207 as applied to the situation at hand.

§ 0.735-28 Confidential statements of employment and financial interests.

(a) *Categories of employees required to submit statements.* The following employees shall submit confidential statements of employment and financial interest prepared in accordance with paragraph (c) of this section. These employees have duties and responsibilities which require the incumbent to report employment and financial interests in order to avoid involvement in a possible conflicts of interest situation, to protect the integrity of the government, and to carry out the purposes of the Federal laws, executive orders and regulations pertaining to conflicts of interest.

(1) All employees paid at the levels of GG-13, GG-14, or GG-15.

(2) All contracting officers in the Office of Administration, and all attorneys in the Office of the General Counsel (including those employees being paid below the GG-13 level).

(3) All special Government employees except those who have worked 60 days or more in the previous calendar year and were paid during that period at a level of GG-16 or above, or an equivalent thereto.

(b) *Notice of employees of time and place to submit statements.* Upon commencing NRC employment, the Office of Administration will provide all employees covered by the reporting requirement with a copy of the statement form. Each employee covered by the reporting requirement shall submit his statement to the head of his office not later than 30 days after his entrance on duty. Statements of special Government employees shall be submitted prior to appointment. Each regular and special Government employee covered by the reporting requirement shall submit to the head of his office a supplementary annual statement by May 15 of each year. The information provided in this annual supplement should reflect the individual's interests as of April 30. Notwithstanding the filing of the report(s) required by this section, each employee shall at all times avoid acquiring a financial interest that could result, or taking an action that would result, in a violation of the conflicts-of-interest provisions of section 208 of Title 18, United States Code, or this Part 0.

(c) *Preparation of statement.* Statements shall be prepared in accordance with the following:

(1) *Statement Form.* The forms prescribed by NRC are:

Regular Government employees—Form NRC 269.

Special Government employees—Form NRC 443.

(2) *Statement content*—(i) *Interests of employee's relatives.* The interest of a spouse, minor child, or other member of an employee's immediate household is considered to be an interest of the employee and must be reported. For the purpose of this paragraph, "member of an employee's immediate household" means full-time residents of the employee's household.

(ii) *Information not known by employees.* If any information required to be included on the statement or supplementary statement, including holdings placed in trust, is not known to the employee but is known to another person, the employee shall request that other person to submit information on his behalf, and shall report such request in Part IV of Form NRC 269 or item 16b. of Form NRC 443.

(iii) *Information not required to be submitted.* A statement or supplementary statement need not contain the following:

(A) Any information relating to the employee's connection with, or interest in, a professional society or a charitable, religious, social, fraternal, recreational, public service, civic, or political organization or a similar organization not conducted as a business enterprise and which is not engaged in the ownership or conduct of a business enterprise. For the purpose of this section, educational and other institutions doing research and development or related work involving grants of money from or contracts with the Government are deemed "business enterprises" and are required to be included in an employee's statement.

(B) Precise amounts of financial interests, indebtedness, or value of real property. The employee may, however, at a later time be required to reveal precise amounts if the NRC needs that information in order to carry out its responsibilities under applicable laws and regulations.

(C) Remote or inconsequential financial interests, as set forth in § 0.735-21(c).

(D) For special Government employees: Those financial interests which are determined by the official responsible for such employee's appointment as not to be related either directly or indirectly to the duties and responsibilities of said employee.

(d) *Reviewing statements and reporting conflicts of interest.* (1) The employee shall prepare the statement in duplicate, retain one copy, and submit one copy to the head of his office.

(2) The office head, in reviewing the statement, shall assess it for conflicts or the appearance of conflicts of interest in the context of the employee's assigned duties and responsibilities in the NRC.

(3) If the office head desires advice and guidance, he may discuss the statement with the counselor or appropriate deputy counselor.

(4) The office head shall discuss with the employee and point out any aspects of the statement which give rise, in the office head's opinion, to questions of conflict or of appearance of conflict. (The office head shall not take, or direct the employee to take, any action with respect to such conflict without first seeking the advice of the counselor or appropriate deputy counselor.)

(5) The office head shall in all cases record his opinion as to the presence or absence of a conflict on the statement and forward same to the NRC counselor or deputy counselor.

(6) The NRC counselor or deputy counselor shall review the statement, and discuss any questions with the employee and/or his respective office head.

(7) If the NRC counselor or deputy counselor believes that the statement evidences no question of conflict of interest, he shall record his opinion on the statement, and notify the office head.

(8) If the NRC counselor or deputy counselor believes there is a question of conflict of interest, he shall return the statement to the office head with his opinion recorded thereon. (The counselor or deputy counselor shall make his services available to the office head and employee involved to assist in effecting a resolution of any conflict or appearance of conflict.) The reviewer shall report to the counselor or deputy counselor the results of endeavors to effect resolution of the conflict at the employee-office head level, which results shall be recorded on the employee's statement and submitted to the counselor or deputy counselor for review and approval.

(9) When a statement submitted or information from other sources indicates a conflict between the interests of an employee and the performance of his service for the NRC and when the conflict or appearance of conflict is not resolved by the head of the employee's office, or the counselor or deputy counselor, the information concerning the conflict or appearance of conflict shall be reported to the Commission, or the Executive Director for Operations, as appropriate. The employee concerned shall be provided an opportunity to explain the conflict or appearance of conflict.

(10) When, after consideration of the explanation of the employee provided for in paragraph (d)(9) of this section, the Commission, or the Executive Director for Operations, as appropriate, decides that remedial action is required, immediate action to end the conflict or appearance of conflict of interest shall be taken. Remedial action may include, but is not limited to:

(i) Changes in assigned duties;

(ii) Divestment by the employee of his conflicting interest;

(iii) Disciplinary action; or

(iv) Disqualification for a particular assignment.

Remedial action, whether disciplinary or otherwise, shall be effected in accordance with any applicable laws, Executive Orders, and regulations. Disciplinary remedial action with respect to an employee of another Government agency assigned or detailed to the NRC shall be effected only by the parent agency.

(11) Upon completion of processing, the statement shall be filed in the office of the counselor or deputy counselor, in a special file maintained for that purpose. An NRC office may request a copy of a statement from the counselor or deputy counselor: *Provided,* That it is required for purposes of carrying out responsibilities under this part.

(12) The required supplementary statements shall be processed in the same manner as an initial statement.

(e) *Confidentiality of employees' statements.* NRC shall hold each statement of employment and financial interests, and each supplementary statement, in confidence. To insure this confidentiality only the NRC counselor, deputy counselor(s), and those office heads to whom reports are to be submitted (including those employees specifically designated by them to assist in the review as may be necessary) are authorized to review the statements as provided in this section. The foregoing employees are responsible for maintaining the statements in confidence and shall not allow access to, or allow information to be disclosed from, a statement except to carry out the purpose of this part. NRC shall not disclose information from a statement except in accordance with procedures set forth in paragraph (d) of this section, or as the Commission, or the Executive Director for Operations, as appropriate, or the Office of Personnel Management shall determine for good cause shown.

(f) *Effect of employee's statements on other requirements.* The statements of employment and financial interests and supplementary statements required of employees are in addition to, and not in substitution for, or in derogation of, any similar requirement imposed by law, order, or regulation. The submission of a statement or supplementary statement by an employee or the absence of any requirement that an employee submit such a statement does not permit him or any other person to participate in a matter in which his or the other person's participation is prohibited by law, order, or regulation.

(g) *Availability of review.* Any employee who believes that his position has been improperly included under this section as one requiring the submission of a statement of employment and financial interests may submit a grievance. A non-bargaining unit employee must use the grievance procedure in NRC Manual Chapter 4157 for review of the complaint. A bargaining unit employee must use the grievance procedure negotiated with the National Treasury Employees Union.

[45 FR 26022, Apr. 17, 1980, as amended at 46 FR 51717, Oct. 22, 1981; 51 FR 35997, Oct. 8, 1986]

§ 0.735-28a Financial disclosure reports under the Ethics in Government Act.

Commissioners, employees and special government employees paid at or above the grade 16 level, and employees whose positions are excepted from the regular competitive appointment process by reason of being of a confidential or policymaking character (unless otherwise excluded by the Office of Government Ethics) shall file public financial disclosure reports (SF 278) in accordance with the requirements of the Ethics in Government Act and regulations of the Office of Government Ethics, 5 CFR Part 734. The employees shall submit their completed forms to the Office of the General Counsel for review. The General Counsel's office shall place the form in the Commission's Public Document Room.

[50 FR 25698, June 21, 1985]

§ 0.735-29 Restriction against ownership of certain security interests by Commissioners, certain staff members and other related personnel.

(a) No Commissioner or employee, including special government employees who are members of the Advisory Committee on Reactor Safeguards, the Atomic Safety and Licensing Board Panel or the Atomic Safety and Licensing Appeal Panel, who occupies a position at or above GS-13 or its equivalent, shall own any stocks, bonds, or other security interests issued by any entity falling within the categories set forth in paragraph (b)(1) of this section. This prohibition also applies to employees who occupy positions below the GS-13 level that fall within occupational codes designated by the Commission. The restrictions set forth in this section apply to spouse, minor child, or other members of the immediate household of a Commissioner, employee, or special government employee. In cases where the entity covered by the prohibition is a subsidiary of another corporation, the prohibition extends to the parent company.

(b) The Commission will publish at least once each year a list of stocks, bonds, and other security interests which employees covered by this section may not own.

(1) These are stocks, bonds, or other security interests issued by:

(i) Publicly or privately owned utilities which have filed an application with the Commission requesting an early site review, or seeking authorization to construct or operate a facility for the generation of electric energy by means of a nuclear reactor and those utilities which have received a construction permit or an operating license from the Commission that is currently effective.

(ii) State or local governments, if the primary purpose of the security is to finance the construction or operation of a nuclear reactor.

(iii) Companies manufacturing or selling nuclear power or test reactors.

(iv) Architectural-engineering companies that have been engaged to provide services relating to a nuclear facility by an applicant for a construction permit or an applicant for an operating license, and architectural-engineering companies which have filed a standard reference design that is under Commission review or has been approved by the Commission and is currently effective.

(v) Companies licensed by the Commission to mill, convert, enrich, fabricate, store, or dispose of source or special nuclear material, or applicants for such licenses.

(2)(i) An individual covered by this section who owns securities described in paragraph (a)(1) of this section shall dispose of them no later than 365 days after the entities first appear on the list described in paragraph (a) of this section. Notwithstanding the provisions of § 0.735-21(c), no employee may participate personally and substantially in a particular matter affecting any entity that appears on the list as long as the employee or his spouse, minor child, or other members of his immediate household owns the security interest.

(ii) An individual newly employed by NRC who is covered by this section shall dispose of any securities described in paragraph (a)(1) of this section that the employee may own no later than 30 days after his entrance on duty and within the same period shall ensure and sign a certification that neither the employee nor any individual who is covered by this section through relationship with him owns any securities described in that paragraph.

(c) Each individual employed by NRC who is covered by this section shall each year sign either: (1) A certification that neither he nor any individual covered by this section through relationship with him owns any securities described in paragraph (a)(1) of this section or, if he or any such individual in fact owns securities therein described, (2) a certification identifying them, disclosing how and when they were acquired and stating approximately when they will be disposed of.

(d) Securities described in paragraph (b)(1) of this section that are acquired oy an individual who is covered by this section through gift, inheritance or other similar involuntary manner shall be disposed of within a reasonable time.

(e) The Commission may exempt an employee from the restrictions of this section where divestiture of the stock, bond, or other security interest is determined to be inequitable by the Commission.

[44 FR 41424, July 17, 1979, as amended at 50 FR 25698, June 21, 1985]

Subpart C—Other Restrictions Imposed by Statute on Conduct of Employees

§ 0.735-30 Description of statutory provisions.

Each employee has a positive duty to acquaint himself with each statute that relates to his ethical and other conduct as an employee of the NRC and of the Government. Certain of these statutes are referred to in §§ 0.735-21—0.735-27. Attention of employees is also directed to the following statutory provisions:

(a) The prohibitions contained in the following sections of the Atomic Energy Act of 1954, as amended: Section 222, "Violation of Specific Sections"; Section 223, "Violation of Sections Generally"; Section 224, "Communication of Restricted Data"; Section 225, "Receipt of Restricted Data"; Section 226, "Tampering With Restricted Data"; and Section 227, "Disclosure of Restricted Data" (42 U.S.C. 2272 through 2277).

(b) The prohibitions against the disclosure of classified information (18 U.S.C. 798, 50 U.S.C. 783).

(c) The prohibition against the disclosure of confidential information (18 U.S.C. 1905).

(d) The prohibition against the employment of a member of a Communist organization (50 U.S.C. 784).

(e) The prohibition against lobbying with appropriated funds (18 U.S.C. 1913).

(f) The prohibition against proscribed political activities in Subchapter III of Chapter 73 of Title 5, U.S. Code and 18 U.S.C. 602, 603, 607, and 608. (See NRC Manual Chapter 4122, "Political Activity.")

(g) The prohibition against bribery of public officials and witnesses (18 U.S.C. 201).

(h) The prohibition against acceptance or solicitation to obtain appointive public office (18 U.S.C. 211).

(i) The prohibitions against disloyalty and striking (5 U.S.C. 7311, 18 U.S.C. 1918). (See also NRC Manual Chapter 4121, "Oath of Office" and NRC Manual Chapter 4166, "Labor-Management Relations Program for Federal Employees.")

(j) The provision relating to the habitual use of intoxicants to excess (5 U.S.C. 7352).

(k) The prohibition against the misuse of a Government vehicle (31 U.S.C. 638a(c)).

(l) The prohibition against the misuse of the franking privilege (18 U.S.C. 1719).

(m) The prohibition against the use of deceit in an examination or personnel action in connection with Government employment (18 U.S.C. 1917).

(n) The prohibition against fraud or false statements in a Government matter (18 U.S.C. 1001).

(o) The prohibition against mutilating or destroying a public record (18 U.S.C. 2071). (See also NRC Appendix 0230, "Records Disposition.")

(p) The prohibition against counterfeiting and forging transportation requests (18 U.S.C. 508).

(q) The prohibition against embezzlement of Government money or property (18 U.S.C. 641). (See also NRC Manual Chapter 5201, "Personal Property Management.")

(r) The prohibition against failing to account for public money (18 U.S.C. 643).

(s) The prohibition against an employee's private use of public money (18 U.S.C. 653).

(t) The prohibition against embezzlement of the money or property of another person in the possession of an employee by reason of his employment (18 U.S.C. 654).

(u) The prohibition against unauthorized use of documents relating to claims from or by the Government (18 U.S.C. 285).

(v) The prohibition against making false entries in official records with intent to defraud or making false reports concerning moneys and securities with such intent (18 U.S.C. 2073).

(w) The prohibition against an employee acting as the agent of a foreign principal registered under the Foreign Agents Registration Act (18 U.S.C. 219).

(x) The Code of Ethics for Government Service (5 U.S.C. 7301).

[32 FR 13652, Sept. 29, 1967, as amended at 40 FR 50704, Oct. 31, 1975; 46 FR 51717, Oct. 22, 1981]

Subpart D—Restrictions Imposed by NRC Administrative Decision on Conduct of Employees

§ 0.735-40 Outside employment and other outside activity.

(a) There is no general prohibition against employees engaging in outside employment or other outside activity; except that no employment or activity may be undertaken which is not compatible with the full and proper discharge of the duties and responsibilities of the employee's Government employment. Incompatible activities include but are not limited to:

(1) Acceptance of a fee, compensation, gift, payment of expense, or any other thing of monetary value in cir-

cumstances in which acceptance may result in, or create the appearance of, conflicts of interests; or

(2) Acceptance of any employment, fee, compensation, or payment of expense, from (i) A Commission licensee; (ii) an applicant for Commission license; (iii) an organization directly engaged in activities in the commercial nuclear field; (iv) a Commission contractor; (v) a Commission supplier; (vi) holder of a license issued by a State pursuant to an agreement between the Commission and the State; (vii) a trade association which represents clients concerning nuclear matters; or (viii) a law firm or other organization which is participating in an NRC proceeding or which regularly represents itself or clients before the NRC, unless written authorization is received pursuant to § 0.735-40(b). Ordinarily, an employee will be authorized to serve as an instructor at an academic institution which holds a Commission license, or to engage in other proposed activities of a similar character; or

(3) Outside employment which tends to impair his mental or physical capacity to perform his Government duties and responsibilities in an acceptable manner.

(b) In any case in which there is a question as to the propriety of outside employment in which an employee proposes to engage, or where prior written authorization is required pursuant to § 0.735-40(a)(2), the employee's office or division head shall prepare and transmit the following information to the appropriate individual(s) specified in paragraph (f) of this section: (1) Name and job title of the employee involved; (2) a brief summary of the employee's official NRC duties; (3) a brief description of the proposed employment or outside activity, including the compensation to be received; (4) the name and nature of the business of the employing individual or organization; (5) his views whether the outside employment or activity should be authorized.

(c) An employee shall not receive any salary or anything of monetary value from a private source as compensation for his services to the Government (18 U.S.C. 209).

(d) Employees are encouraged to engage in teaching, lecturing, and writing that is not prohibited by law, Executive Order 11222, Office of Personnel Management regulations, or the regulations in this part. However, an employee shall not, either for or without compensation, engage in teaching, lecturing, or writing, including teaching, lecturing, or writing for the purpose of the special preparation of a person or class of persons for an examination of the Office of Personnel Management or Board of Examiners for the Foreign Service, that is dependent on information obtained as a result of his Government employment, except when that information has been made available to the general public or will be made available on request, or when the Executive Director for Operations has given written authorization for the use of nonpublic information on the basis that the use is in the public interest.

(e) Except as allowed for training or to attend meetings under section 4111 of title 5, U.S. Code, and Executive Order 10800, no employee shall accept a fee from an outside source on account of a public appearance, a speech, or lecture, if the public appearance or the preparation or delivery of the speech or lecture was a part of the official duties of the employee, if the public appearance, the speech, or the lecture was made during official working hours, or if travel for the purpose of the public appearance, speech, or lecture was made at Government expense. In addition, no employee shall accept a fee for the preparation, publication, or review of an article, story, or book if it was prepared during official working hours and/or was a part of the official duties of the employee.

(f) Employees of offices reporting to the Commission through the Executive Director for Operations must receive the written authorization of the Executive Director for Operations before engaging in activities covered by paragraphs (a)(2) and (b) of this section. The Executive Director for Operations before making his decision shall consult with the head of the employee's office or division and with the counselor or deputy counselor. Employees of boards, panels, and offices reporting directly to the Commission must receive the written authorization of the head of their office before engaging in activities covered by paragraphs (a)(2) and (b) of this section. The head of the employee's office before making his decision shall consult with the counselor or deputy counselor.

(g) Bona fide reimbursements for expenses of travel and such other necessary subsistence may be accepted if (1) It is not prohibited by paragraph (a) of this section, (2) if reimbursement from the government is not received; and (3) it is not proscribed by Decision B-128527 of the Comptroller General dated March 7, 1967, or otherwise prohibited by law. Questions concerning application of the Comptroller General's decision should be referred to the counselor. However, this paragraph does not allow an employee to be reimbursed, or payment to be made on his behalf, for excessive personal living expenses, gifts, entertainment, or other personal benefits.

(h) An employee is not precluded by this section or § 0.735-42 from:

(1) Participation in the affairs of or acceptance of an award for a meritorious public contribution or achievement given by a charitable, religious, professional, social, fraternal, nonprofit educational, recreational, public service, or civic organization.

[31 FR 4502, Mar. 17, 1966, as amended at 32 FR 13652, Sept. 29, 1967; 33 FR 11396, Aug. 10, 1968; 40 FR 8776, Mar. 3, 1975; 40 FR 50704, Oct. 31, 1975; 42 FR 38893, Aug. 1, 1977; 46 FR 51717, Oct. 22, 1981]

§ 0.735-41 Misuse of information.

For the purpose of furthering a private interest, an employee shall not, except as provided in § 0.735-40(d), directly or indirectly use, or allow the use of, official information obtained through or in connection with his Government employment which has not been made available to the general public. See also section 68a of the Atomic Energy Act of 1954, 42 U.S.C., section 2098(a), "Public and acquired lands," which provides as follows:

> a. No individual, corporation, partnership, or association, which had any part, directly or indirectly, in the development of the atomic energy program, may benefit by any location, entry, or settlement upon the public domain made after such individual, corporation, partnership, or association took part in such project, if such individual, corporation, partnership, or association, by reason of having had such part in the development of the atomic energy program, acquired confidential official information as to the existence of deposits of uranium, thorium, or other materials in the specific lands upon which such location, entry, or settlement is made, and subsequent to August 30, 1954, made such location, entry, or settlement, or caused the same to be made for his, or its, or their benefit.

§ 0.735-42 Gifts, entertainment, and favors.

(a) Except as provided in paragraph (b) or (e) of this section, an employee should not solicit or accept, directly or indirectly, any gift, gratuity, favor, entertainment, loan, or any other thing of monetary value, from a person who:

(1) Has, or is seeking to obtain, contractual or other business or financial relations with NRC;

(2) Conducts operations or activities that are regulated by NRC or is an applicant for a license from NRC; or

(3) Has interests that may be substantially affected by the performance or nonperformance of his official duty.

(b) The following exceptions are authorized as being necessary and appropriate in view of the nature of the NRC's work and the duties and responsibilities of its employees:

(1) When the circumstances make it clear that it is obvious family or personal relationships (such as those between the parents, children, or spouse of the employee and the employee) rather than the business of the persons concerned which are the motivating factors;

(2) Acceptance of food and refreshments of nominal value on infrequent occasions in the ordinary course of a luncheon or dinner meeting or other meeting or on an inspection tour where an employee may properly be in attendance;

(3) Acceptance of loans from banks or other financial institutions on customary terms to finance proper and usual activities of employees, such as home mortgage loans;

(4) Acceptance of unsolicited advertising or promotional material, such as pens, pencils, note pads, calendars and other items of nominal intrinsic value; and

(5) Acceptance of transportation not inconsistent with the provisions of paragraph (c) of this section.

(c) No employee shall accept free transportation in motor vehicles, aircraft, or other means, for official or unofficial purposes from NRC contractors, prospective contractors, licensees or prospective licensees, or representatives of any of them when such transportation might reasonably be interpreted as seeking to influence the impartiality of the employee or the agency.

(d) An employee shall not solicit a contribution from another employee for a gift to an official superior, make a donation to an official superior, or accept a gift from an employee receiving less pay than himself (5 U.S.C. 7351), nor shall an employee directly or indirectly solicit from, accept from, offer to, or grant to an official superior or subordinate employee a loan of more than a nominal amount. However, this paragraph does not prohibit: (1) A voluntary gift of nominal value or donation in a nominal amount made on a special occasion such as marriage, illness, or retirement, or (2) a loan as described above of more than a nominal amount where a special personal or business relationship is involved, with prior approval of the higher-ranking employee's supervisor, after consultation with the counselor for NRC, or a deputy counselor, as provided in § 0.735-3(h). A copy of such approval shall be filed as provided for in § 0.735-28(e)(11).

(e) An employee shall not accept a gift, present, decoration, or other thing from a foreign government unless authorized by Congress as provided by the Constitution and in Pub. L. 95-105, 91 Stat. 862.

[31 FR 4502, Mar. 17, 1966, as amended at 32 FR 13653, Sept. 29, 1967; 38 FR 1271, Jan. 11, 1973; 43 FR 1929, Jan. 13, 1978; 50 FR 25698, June 21, 1985]

§ 0.735-43 Use of Government property.

An employee shall not directly or indirectly use, or allow the use of, Government property of any kind, including property leased to the Government, for other than officially approved activities. An employee has a positive duty to protect and conserve Government property, including equipment, supplies, and other property entrusted or issued to him.

§ 0.735-44 Scandalous conduct.

No employee shall engage in criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct or other conduct prejudicial to the Government.

§ 0.735-45 Employee indebtedness.

Except as provided in § 0.735-42(d), the NRC considers the credit affairs of its employees essentially their own concern. However, employees are expected to conduct their credit affairs in a manner which does not reflect adversely on the Government as their employer. The NRC will not be placed in the position of acting as a collection agency for private debts or of determining the validity or amount of contested debts to private concerns. An employee is expected to pay each just financial obligation in a proper and timely manner, especially one imposed by law such as Federal, State, or local taxes. Failure on the part of an employee without good reason to honor just financial obligations or to make or adhere to satisfactory arrangements for settlement may be cause for disciplinary action. For the purpose of this section, a "just financial obligation" means one acknowledged by the employee or reduced to judgment by a court, and "in a proper and timely manner" means in a manner which NRC determines does not, under the circumstances, reflect adversely on the Government as the individual's employer.

[46 FR 51717, Oct. 22, 1981]

§ 0.735-46 Gambling, betting, and lotteries.

An employee shall not participate, while on Government-owned or -leased property or while on duty for the Government, in any gambling activity including the operation of a gambling device, in conducting a lottery or pool, in a game for money or property, or in selling or purchasing a numbers slip or ticket. However, this section does not preclude activities:

(a) Necessitated by an employee's law enforcement duties; or

(b) Under section 3 of Executive Order 10927 and similar agency-approved activities.

§ 0.735-47 Handling of funds entrusted by fellow employees.

No employee shall receive, retain, or disburse funds entrusted to him by fellow employees, e.g., credit union deposits or donations to charitable organizations, except with the utmost care in the safeguarding of such funds and the maintenance of full and complete records with regard to the receipt, custody, and disbursement of such funds. Such records shall be made available to appropriate authorities upon proper request.

§ 0.735-48 Ex parte contacts.

Certain ex parte contacts by an employee are prohibited in quasi-judicial proceedings under §§ 2.719 and 2.780 of this chapter.

§ 0.735-49 Employment of persons on extended leave of absence from a previous employer with reemployment rights or other benefits with the previous employer.

(a) NRC may employ persons on extended leave of absence from private employers where it is the way most advantageous to the NRC to obtain qualified employees with needed skills and no violation of conflict of interest statutes would be involved. The necessity for continued employment of such persons shall be reviewed annually by the Director, Office of Administration. In their NRC assignments, such employees shall not be permitted to handle, directly or indirectly, or have access to, business confidential data of their former employers' competitors.

(b) When it is proposed to employ such a person, a statement of the exact terms and conditions of the leave of absence from his employer will be obtained from the prospective employee and submitted to the General Counsel for a prior determination of possible violation of statute.

(c) The following quotation from 18 U.S.C. 209 is pertinent to this situation.

> (b) Nothing herein prevents an officer or employee of the executive branch of the U.S. Government, or of any independent agency of the United States, or of the District of Columbia, from continuing to participate in a bona fide pension, retirement, group life, health or accident insurance, profit-sharing, stock bonus, or other employee welfare or benefit plan maintained by a former employer.

§ 0.735-49a Other proscribed actions.

An employee shall avoid any action, whether or not specifically prohibited by this Part 0, which might result in, or create the appearance of:

(a) Using a public office for private gain;

(b) Giving preferential treatment to any person;

(c) Impeding Government efficiency or economy;

(d) Losing complete independence or impartiality;

(e) Making a Government decision outside official channels; or

(f) Affecting adversely the confidence of the public in the integrity of the Government.

[32 FR 13653, Sept. 29, 1967]

Subpart E—Ethical and Other Conduct and Responsibilities of Special Government Employees

§ 0.735-50 Use of Government employment.

A special Government employee shall not use his Government employment for a purpose that is, or gives the appearance of being, motivated by the desire for private gain for himself or another person, particularly one with whom he has family, business, or financial ties.

§ 0.735-51 Use of inside information.

(a) A special Government employee shall not use inside information obtained as a result of his Government employment for private gain for himself or another person either by direct action on his part or by counsel, recommendation, or suggestion to another person, particularly one with whom he has family, business, or financial ties. For the purpose of this section, "inside information" means information obtained under Government authority which has not become part of the body of public information.

(b) Special Government employees may teach, lecture, or write in a manner not inconsistent with § 0.735-40(d), in regard to employees.

§ 0.735-52 Coercion.

A special Government employee shall not use his Government employment to coerce, or give the appearance of coercing, a person to provide financial benefit to himself or another person, particularly one with whom he has family, business, or financial ties.

§ 0.735-53 Gifts, entertainment, and favors.

(a) Except as provided in paragraph (b) of this section, a special Government employee, while so employed or in connection with his employment, shall not receive or solicit from a person having business with NRC anything of value as a gift, gratuity, loan, entertainment, or favor for himself or another person, particularly one with whom he has family, business, or financial ties.

(b) Exceptions authorized for employees under § 0.735-42 shall have equal application with respect to special Government employees.

§ 0.735-54 Miscellaneous statutory provisions.

Each special Government employee shall acquaint himself with each statute that relates to his ethical and other conduct as a special Government employee of NRC and of the Government. The NRC official responsible for his appointment shall call his attention specifically to §§ 0.735-21, 0.735-22, 0.735-23, 0.735-24(c), 0.735-25, 0.735-26, 0.735-27, and 0.735-30.

§ 0.735-55 Applicable standards of conduct.

Special Government employees shall adhere to the standards of conduct made applicable to such employees by Subpart B of this part and to the standards of conduct made applicable to regular employees by §§ 0.735-43, 0.735-44, 0.735-46, and 0.735-48. In addition, special Government employees who are not consultants or advisers shall also be subject to §§ 0.735-45 and 0.735-47.

ANNEX A—CODE OF ETHICS FOR GOVERNMENT SERVICE (5 U.S.C. 7301)

Any person in Government service should:

1. Put loyalty to the highest moral principles and to country above loyalty to persons, party, or Government department.
2. Uphold the Constitution, laws, and legal Regulations of the United States and of all governments therein and never be a party to their evasion.
3. Give a full day's labor for a full day's pay; giving to the performance of his duties his earnest effort and best thought.
4. Seek to find and employ more efficient and economical ways of getting tasks accomplished.
5. Never discriminate unfairly by the dispensing of special favors or privileges to anyone, whether for remuneration or not; and never accept, for himself or his family, favors or benefits under circumstances which might be construed by reasonable persons as influencing the performance of his governmental duties.
6. Make no private promises of any kind binding upon the duties of office, since a Government employee has no private word which can be binding on public duty.
7. Engage in no business with the Government, either directly or indirectly, which is inconsistent with the conscientious performance of his governmental duties.
8. Never use any information coming to him confidentially in the performance of governmental duties as a means for making private profit.
9. Expose corruption wherever discovered.
10. Uphold these principles, ever conscious that public office is a public trust.

[46 FR 51717, Oct. 22, 1981]

PART 1—STATEMENT OF ORGANIZATION AND GENERAL INFORMATION

Subpart A—Introduction

Sec.

1.1 Creation and authority.
1.2 Sources of additional information.
1.3 Location of principal offices and regional offices.

Subpart B—Headquarters

1.10 The Commission.

Attachment B

Executive Order 11222

PRESCRIBING STANDARDS OF ETHICAL CONDUCT FOR GOVERNMENT OFFICERS AND EMPLOYEES

By virtue of the authority vested in me by Section 301 of Title 3 of the United States Code, and as President of the United States, it is hereby ordered as follows:

PART I—POLICY

SECTION 101. Where government is based on the consent of the governed, every citizen is entitled to have complete confidence in the integrity of his government. Each individual officer, employee, or adviser of government must help to earn and must honor that trust by his own integrity and conduct in all official actions.

PART II—STANDARDS OF CONDUCT

SECTION 201. (a) Except in accordance with regulations issued pursuant to subsection (b) of this section, no employee shall solicit or accept, directly or indirectly, any gift, gratuity, favor, entertainment, loan, or any other thing of monetary value, from any person, corporation, or group which—

(1) has, or is seeking to obtain, contractual or other business or financial relationships with his agency;

(2) conducts operations or activities which are regulated by his agency; or

(3) has interests which may be substantially affected by the performance or nonperformance of his official duty.

(b) Agency heads are authorized to issue regulations, coordinated and approved by the Civil Service Commission, implementing the provisions of subsection (a) of this section and to provide for such exceptions therein as may be necessary and appropriate in view of the nature of their agency's work and the duties and responsibilities of their employees. For example, it may be appropriate to provide exceptions (1) governing obvious family or personal relationships where the circumstances make it clear that it is those relationships rather than the business of the persons concerned which are the motivating factors—the clearest illustration being the parents, children or spouses of federal employees; (2) permitting acceptance of food and refreshments available in the ordinary course of a luncheon or dinner or other meeting or on inspection tours where an employee may properly be in attendance; or (3) permitting acceptance of loans from banks or other financial institutions on customary terms to finance proper and usual activities of employees, such as home mortgage loans. This section shall be effective upon issuance of such regulations.

(c) It is the intent of this section that employees avoid any action, whether or not specifically prohibited by subsection (a), which might result in, or create the appearance of—

(1) using public office for private gain;

(2) giving preferential treatment to any organization or person;

(3) *impeding government efficiency or economy;*

(4) losing complete independence or impartiality of action;

(5) making a government decision outside official channels; or

(6) affecting adversely the confidence of the public in the integrity of the Government.

SEC. 202. An employee shall not engage in any outside employment, including teaching, lecturing, or writing, which might result in a conflict, or an apparent conflict, between the private interests of the employee and his official government duties and responsibilities, although such teaching, lecturing, and writing by employees are generally to be encouraged so long as the laws, the provisions of this order, and Civil Service Commission and agency regulations covering conflict of interest and outside employment are observed.

SEC. 203. Employees may not (a) have direct or indirect financial interests that conflict substantially, or appear to conflict substantially, with their responsibilities and duties as Federal employees, or (b) engage in, directly or indirectly, financial transactions as a result of, or primarily relying upon, information obtained through their employment. Aside from these restrictions, employees are free to engage in lawful financial transactions to the same extent as private citizens. Agencies may, however, further restrict such transactions in the light of the special circumstances of their individual missions.

SEC. 204. An employee shall not use Federal property of any kind for other than officially approved activities. He must protect and conserve all Federal property, including equipment and supplies, entrusted or issued to him.

SEC. 205. An employee shall not directly or indirectly make use of, or permit others to make use of, for the purpose of furthering a private interest, official information not made available to the general public.

SEC. 206. An employee is expected to meet all just financial obligations, especially those—such as Federal, State, or local taxes—which are imposed by law.

PART III—STANDARDS OF ETHICAL CONDUCT FOR SPECIAL GOVERNMENT EMPLOYEES

SECTION 301. This part applies to all "special Government employees" as defined in Section 202 of Title 18 of the United States Code, who are employed in the Executive Branch.

SEC. 302. A consultant, adviser or other special Government employee must refrain from any use of his public office which is motivated by, or gives the appearance of being motivated by, the desire for private gain for himself or other persons, including particularly those with whom he has family, business, or financial ties.

SEC. 303. A consultant, adviser, or other special Government employee shall not use any inside information obtained as a result of his government service for private personal gain, either by direct action on his part or by counsel, recommendations or suggestions to others, including particularly those with whom he has family, business, or financial ties.

SEC. 304. An adviser, consultant, or other special Government employee shall not use his position in any way to coerce, or give the appearance of coercing, another person to provide any financial benefit to him or persons with whom he has family, business, or financial ties.

SEC. 305. An adviser, consultant, or other special Government employee shall not receive or solicit from persons having business with his agency anything of value as a gift, gratuity, loan or favor for himself or persons with whom he has family, business, or financial ties while employed by the government or in connection with his work with the government.

SEC. 306. Each agency shall, at the time of employment of a consultant, adviser, or other special Government employee require him to supply it with a statement of all other employment. The statement shall list the names of all the corporations, companies, firms, State or local governmental organizations, research organizations and educational or other institutions in which he is serving as employee, officer, member, owner, director, trustee, adviser, or consultant. In addition, it shall list such other financial information as the appointing department or agency shall decide is relevant in the light of the duties the appointee is to perform. The appointee may, but need not, be required to reveal precise amounts of investments. The statement shall be kept current throughout the period during which the employee is on the Government rolls.

PART IV—REPORTING OF FINANCIAL INTERESTS

SECTION 401. (a) Not later than ninety days after the date of this order, the head of each agency, each Presidential appointee in the Executive Office of the President who is not subordinate to the head of an agency in that Office, and each full-time member of a committee, board, or commission appointed by the President, shall submit to the Chairman of the Civil Service Commission a statement containing the following:

(1) A list of the names of all corporations, companies, firms, or other business enterprises, partnerships, nonprofit organizations, and educational or other institutions—

(A) with which he is connected as an employee, officer, owner, director, trustee, partner, adviser, or consultant; or

(B) in which he has any continuing financial interests, through a pension or retirement plan, shared income, or otherwise, as a result of any current or prior employment or business or professional association; or

(C) in which he has any financial interest through the ownership of stocks, bonds, or other securities.

(2) A list of the names of his creditors, other than those to whom he may be indebted by reason of a mortgage on property which he occupies as a personal residence or to whom he may be indebted for current and ordinary household and living expenses.

(3) A list of his interests in real property or rights in lands, other than property which he occupies as a personal residence.

(b) Each person who enters upon duty after the date of this order in an office or position as to which a statement is required by this section shall submit such statement not later than thirty days after the date of his entrance on duty.

(c) Each statement required by this section shall be kept up to date by submission of amended statements of any changes in, or additions to, the information required to be included in the original statement, on a quarterly basis.

SEC. 402. The Civil Service Commission shall prescribe regulations, not inconsistent with this part, to require the submission of statements of financial interests by such employees, subordinate to the heads of agencies, as the Commission may designate. The Commission shall prescribe the form and content of such statements and the time or times and places for such submission.

SEC. 403. (a) The interest of a spouse, minor child, or other member of his immediate household shall be considered to be an interest of a person required to submit a statement by or pursuant to this part.

(b) In the event any information required to be included in a statement required by or pursuant to this part is not known to the person required to submit such statement but is known to other persons, the person concerned shall request such other persons to submit the required information on his behalf.

(c) This part shall not be construed to require the submission of any information relating to any person's connection with, or interest in, any professional society or any charitable, religious, social, fraternal, educational, recreational, public service, civic, or political organization or any similar organization not conducted as a business enterprise and which is not engaged in the ownership or conduct of a business enterprise.

SEC. 404. The Chairman of the Civil Service Commission shall report to the President any information contained in statements required by Section 401 of this part which may indicate a conflict between the financial interests of the official concerned and the performance of his services for the Government. The Commission shall report, or by regulation require reporting, to the head of the agency concerned any information contained in statements submitted pursuant to regulations issued under Section 402 of this part which may indicate a conflict between the financial interests of the officer or employee concerned and the performance of his services for the Government.

SEC. 405. The statements and amended statements required by or pursuant to this part shall be held in confidence, and no information as to the contents thereof shall be disclosed except as the Chairman of the Civil Service Commission or the head of the agency concerned may determine for good cause shown.

SEC. 406. The statements and amended statements required by or pursuant to this part shall be in addition to, and not in substitution for, or in derogation of, any similar requirement imposed by law, regulation, or order. The submission of a statement or amended statements required by or pursuant to this part shall not be deemed to permit any person to participate in any matter in which his participation is prohibited by law, regulation, or order.

PART V—DELEGATING AUTHORITY OF THE PRESIDENT UNDER SECTIONS 205 AND 208 OF TITLE 18 OF THE UNITED STATES CODE RELATING TO CONFLICTS OF INTEREST

SECTION 501. As used in this part, "department" means an executive department, "agency" means an independent agency or establishment or a Government corporation, and "head of an agency" means, in the case of an agency headed by more than one person, the chairman or comparable member of such agency.

SEC. 502. There is delegated, in accordance with and to the extent prescribed in Sections 503 and 504 of this part, the authority of the President under Sections 205 and 208(b) of Title 18, United States Code, to permit certain actions by an officer or employee of the Government, including a special Government employee, for appointment to whose position the President is responsible.

SEC. 503. Insofar as the authority of the President referred to in Section 502 extends to any appointee of the President subordinate to or subject to the chairmanship of the head of a department or agency, it is delegated to such department or agency head.

SEC. 504. Insofar as the authority of the President referred to in Section 502 extends to an appointee of the President who is within or attached to a department or agency for purposes of administration, it is delegated to the head of such department or agency.

SEC. 505. Notwithstanding any provision of the preceding sections of this part to the contrary, this part does not include a delegation of the authority of the President referred to in Section 502 insofar as it extends to:

(a) The head of any department or agency in the Executive Branch;

(b) Presidential appointees in the Executive Office of the President who are not subordinate to the head of an agency in that Office; and

(c) Presidential appointees to committees, boards, commissions, or similar groups established by the President.

PART VI—PROVIDING FOR THE PERFORMANCE BY THE CIVIL SERVICE COMMISSION OF CERTAIN AUTHORITY VESTED IN THE PRESIDENT BY SECTION 1753 OF THE REVISED STATUTES

SECTION 601. The Civil Service Commission is designated and empowered to perform, without the approval, ratification, or other action of the President, so much of the authority vested in the President by Section 1753 of the Revised Statutes of the United States (5 U.S.C. 631) as relates to establishing regulations for the conduct of persons in the civil service.

SEC. 602. Regulations issued under the authority of Section 601 shall be consistent with the standards of ethical conduct provided elsewhere in this order.

PART VII—GENERAL PROVISIONS

SECTION 701. The Civil Service Commission is authorized and directed, in addition to responsibilities assigned elsewhere in this order:

(a) To issue appropriate regulations and instructions implementing Parts II, III, and IV of this order;

(b) To review agency regulations from time to time for conformance with this order; and

(c) To recommend to the President from time to time such revisions in this order as may appear necessary to ensure the maintenance of high ethical standards within the Executive Branch.

SEC. 702. Each agency head is hereby directed to supplement the standards provided by law, by this order, and by regulations of the Civil Service Commission with regulations of special applicability to the particular functions and activities of his agency. Each agency head is also directed to assure (1) the widest possible distribution of regulations issued pursuant to this section, and (2) the availability of counseling for those employees who request advice or interpretation.

SEC. 703. The following are hereby revoked:

(a) Executive Order No. 10939 of May 5, 1961.

(b) Executive Order No. 11125 of October 29, 1963.

(c) Section 2(a) of Executive Order No. 10530 of May 10, 1954.

(d) White House memorandum of July 20, 1961, on "Standards of Conduct for Civilian Employees."

(e) The President's Memorandum of May 2, 1963, "Preventing Conflicts of Interest on the Part of Special Government Employees." The effective date of this revocation shall be the date of issuance by the Civil Service Commission of regulations under Section 701(a) of this order.

SEC. 704. All actions heretofore taken by the President or by his delegates in respect of the matters affected by this order and in force at the time of the issuance of this order, including any regulations prescribed or approved by the President or by his delegates in respect of such matters, shall, except as they may be inconsistent with the provisions of this order or terminate by operation of law, remain in effect until amended, modified, or revoked pursuant to the authority conferred by this order.

SEC. 705. As used in this order, and except as otherwise specifically provided herein, the term "agency" means any executive department, or any independent agency or any Government corporation; and the term "employee" means any officer or employee of an agency.

LYNDON B. JOHNSON

THE WHITE HOUSE,
May 8, 1965.

Attachment C

U. S. NUCLEAR REGULATORY COMMISSION
NRC MANUAL

Volume: 0000 General Administration
Part : 0700 Inspections, Investigations and Appraisals OIA

CHAPTER 0702 NOTIFICATION AND INVESTIGATION OF MISCONDUCT

0702-01 COVERAGE

This chapter covers NRC's procedures for having misconduct of NRC and contractor employees reported to and investigated by the Office of Inspector and Auditor. This chapter does not apply to employees of NRC licensees or their contractors.

0702-02 OBJECTIVES

021 To assure that all facts in connection with alleged or indicated misconduct or improper actions of NRC and contractor employees are gathered through an impartial investigation and reported to the Commission or the Executive Director for Operations.

022 To assure that each employee who may be guilty of misconduct or improper action will be disciplined in the same manner as others under similar conditions regardless of his position in the organization.

0702-03 RESPONSIBILITIES AND AUTHORITIES

031 Employees shall report to the Director of their Office all allegations or indications of misconduct, including fraud, graft, corruption, and diversion of NRC assets, of NRC and contractor employees; however, when the exigencies of the circumstances dictate, employees may make such reports directly to the Office of Inspector and Auditor.

032 The Directors of Offices:

a. report to the Director, Office of Inspector and Auditor, all allegations or indications of misconduct, including fraud, graft, corruption, and diversion of NRC assets, of NRC and contractor employees.

b. take necessary action as a result of the Office of Inspector and Auditor investigations as soon as possible.

Approved: November 26, 1979

c. submit a statement in duplicate to the Director, Office of Inspector and Auditor, within 30 days after receipt of the investigative report indicating what action has been taken on the basis of the investigative report or explain why further action was not deemed necessary.

033 The Director, Office of Inspector and Auditor:

a. investigates and reports on all alleged or indicated misconduct of NRC and contractor employees.

b. discusses the results of investigations with and furnishes copies of reports to the Commission, the Executive Director for Operations, or the responsible NRC official, as appropriate.

c. maintains records of all allegations, investigations, and action taken.

d. approves release of investigative reports to other governmental agencies when required for use in conducting official business.

e. refers any suspected or alleged criminal violations to the Department of Justice, after appropriately informing or consulting with the Office of the General Counsel.

f. maintains liaison with the Federal Bureau of Investigation and other law enforcement agencies on all criminal and other investigative matters.

g. maintains liaison with the Special Counsel, Merit Systems Protection Board, on all investigative matters.

0702-04 DEFINITIONS

Misconduct as used herein applies to misconduct of any kind as identified in Chapter NRC-4124, "Conduct of Employees," and includes fraud, graft, corruption and diversion of NRC assets or any conduct prejudicial to the Government.

0702-05 BASIC REQUIREMENTS

051 Applicability. The provisions of this chapter are applicable to and shall be followed by all NRC Offices, including their contractor employees.

052 Access to Investigative Report.

a. Investigative reports shall not be made available to persons under investigation, except as provided otherwise by statute or regulation (e.g., the Freedom of Information and Privacy Acts).

Approved: November 26, 1979

b. Copies of investigative reports are not to be transmitted to any individual or organization outside the NRC without the approval of the Director, Office of Inspector and Auditor.

053 Report. Within 30 days after receipt of investigative report, the responsible official will submit statement of action taken to the Director, Office of Inspector and Auditor (see 032c. above).

054 References.

a. Atomic Energy Act of 1954, as amended, §§25c. and 161c. (42 USC §§2035c. and 2201c.).

b. Energy Reorganization Act of 1974 §201(f) (42 USC 5841(f)).

c. 10 CFR, Part 0, "Conduct of Employees," and references cited therein.

d. 10 CFR §1.30, "Office of Inspector and Auditor."

e. NRC Chapter and Appendix 0113, "Organization and Functions,Office of Inspector and Auditor."

f. NRC Chapter and Appendix 4124, "Conduct of Employees."

PREPARED TESTIMONY
SUBMITTED BY
UNITED STATES NUCLEAR REGULATORY COMMISSION

TO

SUBCOMMITTEE ON NUCLEAR REGULATION
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE

CONCERNING
THE OFFICE OF INSPECTOR AND AUDITOR

PRESENTED BY
VICTOR STELLO, JR.
EXECUTIVE DIRECTOR FOR OPERATIONS

SUBMITTED: OCTOBER 8, 1987

Mr. Chairman and members of the Subcommittee, I appear before you today to discuss the internal investigative and audit functions of the NRC. I have been requested to specifically address the organization, implementation, and effectiveness of the Commission's internal investigative and audit program.

In the current organizational structure of the Commission, the Office of Inspector and Auditor (OIA) is responsible for the conduct of internal investigations and audits. This office reports directly to the Commission. The Office is headed by a Director, who is assisted by an Assistant Director for Administrative Audits, an Assistant Director for Technical Audits and an Assistant Director for Investigations. Within NRC's total budget availability, the Commission has allocated 26 staff to this office, which in turn has allocated about two-thirds of those resources to the audit function and the remaining third of the resources to the internal investigatory function.

Each year, OIA solicits input from staff and the Commission in developing their audit plan for the upcoming fiscal year. The programs or activities suggested for audit are reviewed by OIA and an audit plan is developed. Even though staff input to this process in no way binds OIA to conduct certain audits, it does serve as a useful tool to alert OIA to areas which may need corrective action. Once OIA finalizes its audit plan, the Commission is informed; the Commission neither approves nor disapproves OIA's audit plan. Once an audit is conducted, the findings and recommendations are sent to me, for audits involving programs or activities under my areas of responsibility. This gives me an opportunity to review the facts of the matter, and provide a response to each of the OIA recommendations. In those occasional instances where staff and OIA disagree on the resolution of an issue, the issue is forwarded by OIA at their discretion to the Commission for resolution. Since 1981 there have been six such issues. A followup audit is conducted approximately six months to a year after the initial audit to determine whether the recommended responses were in fact implemented. In addition, my staff independently tracks the implementation of audit recommendations so that I can be assured that any necessary corrections to programs or activities under my areas of responsibility are made. From staff's perspective, the Office of Inspector and Auditor has in the past and continues to perform the Commission's internal audit program with independence and effectiveness. As EDO, I find OIA work of good quality and its independent viewpoint of considerable value to me in reviewing the work of my staff.

OIA's investigatory responsibilities encompass all NRC programs and operations. OIA investigates allegations of NRC employee misconduct, wrongdoing by NRC contractors, claims for personal property loss or damage, tort claims against the United States and claims of fraud, waste, or mismanagement. OIA can independently initiate an investigation or can initiate an investigation based on allegations from NRC employees, contractors, other Federal agencies or the public. Once an investigation is completed, a report of the investigation with a summary of the findings is issued. Unless the investigation uncovers a systematic weakness in internal controls, no recommendation is made. OIA sends the report to the person who will be responsible for taking corrective action. This could be a Division Director within an office, an Office Director, myself, or the Commission, depending on the seriousness of the allegation and the level of the employee involved. Managers are required to reply to OIA within 30 days of receipt of the report the corrective actions taken. OIA refers criminal matters to the Department of Justice, including U.S. Attorneys and the Federal Bureau of Investigation. It is my opinion that OIA has the necessary authority and autonomy to implement an effective internal investigation program.

In summary, I believe that OIA does an excellent job in both the audit and investigative areas. From my perspective they have the necessary resources to execute their program, but it should be recognized that OIA's budget is controlled by the Commission, not the EDO. While OIA is independent, I naturally reserve the right to disagree with OIA conclusions and recommendations on OIA audits. The staff is generally more expert in understanding of NRC's regulatory regime, and of technical issues, than OIA. A case in point was on Audit of TVA work in which staff disagreed with OIA (on one recommendation out of 11), i.e., whether an LER submitted by the licensee was misleading because it was not in sufficient detail. This difference of opinion will be resolved by the Commission.

I also believe that OIA is not always as timely as staff would desire in concluding investigations, recognizing that a thorough investigation is time consuming. Nevertheless, in such cases I indicate my concern. The most recent notable example concerned the Comanche Peak investigation which extended over a eight month period. I spoke strongly for expeditious handling because of the extreme instability caused in the Region involved by the lengthy investigation. OIA heard me out, but chose to pursue the issues deliberately. I have in such matters the prerogative to make my argument, but I have no authority to go further.

All those matters are part of any process in which two offices have different responsibilities and different perspectives. On balance, it is my opinion that OIA does good work. OIA has a requirement for independence and has that independence from the staff in full measure in the framework which now exists. Congress in addressing independence should examine the total operation and not concentrate only on exceptions.

I must, in closing, contrast the difference between OIA and OI. OIA audits and investigates staff work and staff personnel for the Commission. OI gathers facts on licensees for staff use in coming to a staff conclusion on facility safety. OIA therefore requires - and has - independence from staff control. OI, on the other hand, works hand-in-glove with staff to determine what to investigate and the priorities of investigation, and in most instances is involved with staff during the investigative process. There are rare exceptions in which the Commission excludes the staff from knowledge of or participation in an investigation, but the mechanism to handle this exists. To build a wall between OI and the staff would clearly make licensed plants less safe, not more safe.

Thank you for the opportunity to present this testimony. I will be pleased now to answer such further questions as the Subcommittee might have.

STATEMENT OF

SHARON R. CONNELLY, DIRECTOR

OFFICE OF INSPECTOR AND AUDITOR

UNITED STATES NUCLEAR REGULATORY COMMISSION

TO

SUBCOMMITTEE ON NUCLEAR REGULATION

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

UNITED STATES SENATE

CONCERNING

THE OFFICE OF INSPECTOR AND AUDITOR

SUBMITTED: OCTOBER 8, 1987

Mr. Chairman and members of the Subcommittee, I appreciate the opportunity to appear before you today to discuss the Nuclear Regulatory Commission's Office of Inspector and Auditor, which I will refer to as OIA, and the proposed legislation to establish an inspector general at the NRC. As you requested in your letter of invitation, I will discuss the adequacy of OIA's organization and structure as well as its resources. In doing so, I will compare and contrast OIA with the statutory offices of inspectors general.

I believe the Commission's existing organization and structure for the conduct of internal investigations and audits are adequate. OIA is organized and operates very much like a statutory inspector general. The Director, OIA, like the statutory inspectors general, reports to the agency head, which, in the NRC, is the five-member Commission. OIA has audit and investigative units that are charged with identifying fraud, waste and mismanagement and promoting the effectiveness and efficiency of NRC programs. I believe there are no organizational impairments to the effective and efficient operation of OIA.

I also believe we have the resources needed to carry out our responsibilities. We have been allocated 26 full-time equivalent positions. Our current on-board professional staff consists of 7 investigators, 13 auditors, a computer specialist and a nuclear engineer. In recent times of declining resources in the NRC, the Commission has allowed OIA to maintain a stable resource complement. One or two additional investigator positions would allow us to complete our investigations more quickly, but we do not believe safety-related or other significant investigations are unduly delayed because of a lack of resources.

During my three-year tenure as Director, OIA, I have had full access to the Commission. I routinely provide briefings to the Chairman on significant OIA activities. The Commission periodically requests briefings on audits and investigations which relate to safety issues affecting near-term operating licenses and other matters requiring Commission decisions. I have found the Commission, as a whole, to be supportive of OIA's activities and responsive to our findings.

OIA's mission is the same as the statutory inspectors general. We conduct audits and investigations to detect and prevent fraud and abuse in agency programs and operations; coordinate relationships between the NRC and other federal, state and local counterparts; and advise the Commission on matters concerning fraud, integrity abuses, deficiencies and other serious problems relating to agency programs and operations. OIA carries out its responsibilities in accordance with the same professional standards for auditors and investigators that are followed by the statutory inspectors general.

The statutory inspectors general are presidential appointees, confirmed by the Senate. They are appointed without regard to political affiliation and solely on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration or investigations. The Director of OIA is appointed by the Commission. It is my understanding that, in the past, the NRC has used substantially the same criteria to make selections for the position of Director, OIA as are used for appointing statutory inspectors general.

While OIA does not have the statutory protection of independence, there is no interference by the Commission with the operations of the office. The Commission may occasionally direct OIA to conduct an audit or investigation, but there are never any limitations, restrictions or other impairments placed by the Commission on the conduct of our assignments. Furthermore, since I have been Director, the Commission has never directed OIA to terminate an assignment. The Commission structure is such that it is impossible for any one commissioner to effectively interfere with OIA's activities, and from a practical standpoint, I believe it would be highly unlikely that a majority of Commissioners would attempt to improperly influence the outcome of an internal audit or investigation.

Consistent with the inspector general concept, OIA works cooperatively with various organizations in the NRC to accomplish our mission, except when such a relationship would compromise our independence. As part of our annual audit planning, we solicit suggestions from the Commission and the Executive Director for Operations (EDO) for specific audits they would like performed by our office. In addition, we often perform services at the request of the Commission or EDO and serve as technical advisors to the agency in such areas as financial management systems and internal controls.

Most of our audits and investigations involve programs or people under the direction of the EDO. The EDO or his staff frequently refer matters to us for review or investigation. The EDO is highly responsive to our recommendations and ensures the full cooperation of his staff in providing information or assisting in our audits or investigations. There have been times when the EDO disagreed with our recommendations. We have escalated these differences, as appropriate, to the Commission for resolution in accordance with the requirements of the Office of Management and Budget. I have prompt and personal access to the EDO, and I find that he responds quickly to items that I bring to his attention.

There are some minor differences between OIA and the statutory inspector general offices. First, OIA does not have subpoena authority; however, we can request the Commission to issue a subpoena on our behalf. Secondly, the statutory inspectors general review existing and proposed legislation and regulations for their impact on economy and efficiency and their susceptibility to fraud and abuse. While OIA reviews the implementation of existing legislation and regulations in the course of our ongoing assignments, and suggests changes where needed, we do not review proposed legislation and regulations on a regular basis. Third, OIA does not issue a semi-annual report to the Congress as do the statutory inspectors general, but we do issue an annual report of OIA activities to the Commission that is provided, upon request, to the Congress.

I believe we have made significant strides in the management and operation of OIA in the past three years. We have added a nuclear engineer to our staff to broaden our capability to identify and analyze technical and safety issues. We have also occasionally requested and received engineering and ADP assistance from the agency to augment our audit and investigative capability. On some assignments, we have initiated a team approach using auditors, investigators, ADP, and technical personnel to conduct major reviews when important safety questions were at issue, and the Commission needed a timely and thorough assessment of NRC staff conduct to make licensing and regulatory decisions. We have obtained the computer equipment and software which allows us to accumulate and analyze a much greater amount of data in a significantly shorter period of time. We have developed a comprehensive management information system, and we have established formal training programs for our employees to enhance their audit and investigative skills.

In the past three years we issued 51 audit reports. Additionally during these years, we issued 56 reports following up on prior years' recommendations. We made 258 audit recommendations for corrective action to NRC management during this three-year period; 241 of those recommendations were accepted by NRC management for implementation. We issued 136 reports of investigation and inquiry and addressed 28 matters that were closed to the file after preliminary review.

While I strongly support the inspector general concept in the federal government, I have one serious reservation about a statutory inspector general in the NRC. It has been my experience that the NRC Commission, in order to make certain policy and licensing decisions, needs an independent office it can occasionally direct to review certain actions of the NRC staff. For example, prior to making licensing decisions, the Commission has a need to know whether there are any indications of NRC staff misconduct which may impact on safety. To accommodate the Commission's requirements, OIA closely monitors upcoming licensing decisions and adjusts its priorities to obtain the information the Commission needs, in the time frame needed, to avoid delays in licensing decisions.

OIA has an obligation to respond timely to the Commission's needs; it is not clear that a statutory inspector general would have the same obligation. While I understand that statutory inspectors general and management pursue the same objective, that is, the efficient and effective operation of programs, and they also function as part of the agency head's senior management team, it is not at all clear that a statutory inspector general in the NRC would be required to adjust priorities and respond to the Commission's need for safety-related information. The Inspector General Act of 1978 provides that the agency head shall not prevent or prohibit the inspector general from initiating, carrying out, or completing any audit or investigation. This implies that, given an environment of limited resources, the inspector general, not the Commission, would determine the inspector general's priorities when differences of opinion arise over which audits and investigations should be conducted. It has been my experience that the Commission, with its broad base of technical support, is in a better position than OIA, or a statutory inspector general, to assess the safety significance of allegations affecting the Commission's licensing and regulatory decisions and any accompanying need for quick resolution.

In the event a statutory inspector general is not forthcoming in the NRC, there are two changes I would propose to improve the effectiveness of OIA. The first is to change OIA's name to the Office of Inspector General. A number of non-statutory audit and investigative offices carry this title, which is more easily recognized by those who have allegations to report. The second proposal is to require investigations of senior OIA officials to be performed by persons outside the NRC. This would ensure OIA employees are not investigated by the same persons they have audited or investigated.

Lastly, there is proposed legislation to place the NRC's Office of Investigations (OI) in a statutory inspector general office. I do not believe OI should be included in the NRC's internal audit and investigative office. Similar to the EDO's mission, OI's function is essentially one of regulatory compliance, that is, it investigates allegations of willful or intentional violations of NRC requirements. Because of the complimentary nature of their missions, OI and the EDO must work closely with each other. The close working relationship between OI and the EDO's staff could present a serious problem to an inspector general office. It would be impossible to maintain a close working relationship with the EDO staff on one hand, and audit and investigate them on the other. The appearance of objectivity and independence would be shattered.

This concludes my statement. I would be pleased to answer any questions you have.

NUCLEAR REGULATORY COMMISSION OVERSIGHT

Relationship With Industry

TUESDAY, OCTOBER 20, 1987

U.S. Senate,
Committee on Environment and Public Works,
Subcommittee on Nuclear Regulation,
Washington, DC.

The subcommittee met at 9:39 a.m. in room SD-406, Dirksen Senate Office Building, Hon. John B. Breaux (chairman of the subcommittee) presiding.

Present: Senators Breaux and Simpson.

OPENING STATEMENT OF HON. JOHN B. BREAUX, U.S. SENATOR FROM THE STATE OF LOUISIANA

Senator Breaux. The subcommittee will please come to order. This morning, the Subcommittee on Nuclear Regulation continues its series of oversight hearings on areas and aspects of what has come to be known as the Nuclear Regulatory Commission's proposal for its licensed facilities.

In our most recent hearings, our effort focused on examination of the structure, the functions, and the procedures of the Commission's offices, the Office of Investigations and the Office of Inspectors and Auditing.

In today's hearing, we will be focusing on the regulatory approach utilized by the Commission in its effort to satisfy the mandate of the Atomic Energy Act and that it regulate the industry in a manner that is protective of the public health and the safety.

In that regard, we will want to give special attention to the decision of the Commission as to public policy statements, which depend on industry initiatives for their implementation, in lieu of regulations, for certain issues that raise public health and safety concerns.

Additionally, we will want to focus on the process undertaken within the Commission when it determines that it is necessary to promulgate regulations. The goal of this inquiry is to determine whether or not the regulated industry is to be given a special consideration by the Commission during the regulatory development process.

We have a great deal of ground to cover in the hearings. The results of this effort will, I think, yield ample food for thought as the subcommittee wrestles with problems presented by a significant lack of confidence on the part of the American public that this agency has not always had its interest in mind.

For the benefit of the interest of the audience and the members, the chair will note that we will have an additional hearing on the 29th of October, at which time we will receive testimony on a number of legislative proposals advocating change to the Commission structure and organization.

It is my intent, at the conclusion of that hearing, in close consultation with the members of the Subcommittee, to develop a legislative package that will address many of the issues that we have explored throughout this oversight hearing process. That package will serve as the basis for action by the Subcommittee on the reauthorization legislation for the NRC.

Our colleague and Ranking Republican member, Senator Simpson, is on his way. He is detained on the floor of the Senate and will be joining us just as soon as he is able to break away.

With that, we would like to welcome, once again, the Commission members. They have joined us, and we appreciate their being here. We would like to welcome all the members. Admiral, we are pleased to have you as the spokesperson for the Commission.

Senator Simpson has arrived. Do you have any comments at this time, Al, or not.

OPENING STATEMENT OF HON. ALAN K. SIMPSON, U.S. SENATOR FROM THE STATE OF WYOMING

Senator SIMPSON. Mr. Chairman, thank you. I think I will just insert my remarks in the record. This is another in a series of hearings on the relationship of the NRC to the industry it regulates and various legislative proposals that have been recommended to address the concerns that we have about organization and structure. I want to continue to commend you for the fine job you are doing, particularly in the effort to get a complete and balanced perspective of what is actually going on.

I will just enter the rest of the statement in the record.

I want to say to the chairman and the Commission that I came on a little heavy the last time we gathered, and please understand that the things I was saying have nothing to do with you, Mr. Chairman, as a person or the Commissioners as persons. I speak of my frustration watching the Commission for 9 years and seeing that it just can't function under the present structure and how bad that is and how frustrating that must be for you.

Mr. Chairman, I have nothing but the highest regard for you as to what you are trying to do and the members as to what they are trying to do. But I just think until we change something deep down in the structure that we will never really meet the task of protecting the public health and safety, which is the sole mission of the NRC.

So I as I say, I wouldn't want to leave any impression that you haven't been striving with all of your diligence of a lifetime of career service to this Nation and all of you, in various ways, with a very unique blend of personalities and talents and skills. Our job is to put the machinery together to make it work better than it does. That is what I have been trying to do for 9 years.

Thank you, Mr. Chairman.
[Senator Simpson's written statement follows:]

OPENING STATEMENT OF HON. ALAN K. SIMPSON, U.S. SENATOR FROM THE STATE OF WYOMING

Mr. Chairman, I just have a few brief opening remarks that I should like to make about this morning's hearing. This is the third in the subcommittee's series of hearings on the relationship of the NRC to the industry that it regulates and on the various legislative proposals that have been recommended to address the concerns that have arisen about the Commission's organization and structure. Our last two hearings, of course, focused on the internal and external investigative responsibilities of the Commission—and I want to commend you for the fine job that you did in those hearings, Mr. Chairman, particularly in your effort to get a complete and balanced perspective of what was actually going on in this area.

Today's hearing moves into a new arena—the issue of NRC's regulatory process. We will focus this morning on the Commission's approach to carrying out its mandate to protect the public health and safety—and this is indeed its sole mandate under the Atomic Energy Act. We will look at the process used by the Commission for establishing and enforcing regulations, and the more recent use of Commission "policy statements" as an approach to regulating an industry that is truly diverse in the challenges that it presents as well as the hardware that it operates.

We will look at the industry initiatives in the areas of training, maintenance, and drug use—issues where the industry has taken the lead and, at least in the area of training, done a first rate job.

We will look at various commission regulatory efforts—including the material false statement, backfit, and fire protection rules.

And finally, we will look at the issue of enforcement—both with respect to policy statements and with respect to the more prescriptive regulatory process.

In the near future, these hearings will conclude with a hearing on the various legislative proposals that have been recommended and referred to this subcommittee. I look forward both to this morning's hearing, Mr. Chairman, and to our future consideration of those legislative initiatives, as we move forward—as we must—with reform of the Commission structure and process. Just one final note: I again want to pay a special note of thanks to our two GAO investigators, John Barker and Jack Bagnulo ("bag-new-low"), who have once again put in long hours in assisting in the preparation of this hearing. They are both doing a truly first-rate job and I appreciate their assistance.

Senator **BREAUX**. Thank you, Senator, and with that, we would like to welcome Admiral Zech and the Commission members.

STATEMENT OF HON. LANDO W. ZECH, JR., CHAIRMAN NUCLEAR REGULATORY COMMISSION, ACCOMPANIED BY THOMAS M. ROBERTS, COMMISSIONER; FRED BERNTHAL, COMMISSIONER; AND KENNETH C. ROGERS, COMMISSIONER

Mr. **ZECH**. Thank you very much, Mr. Chairman. My fellow Commissioners and I are pleased to appear before you today, Mr. Chairman, to discuss the regulatory interface between the Nuclear Regulatory Commission and the industry. Commissioner Carr is on official travel in Europe and sends his regrets.

My prepared statement discusses the specific issues raised in your letter of invitation. With your permission, Mr. Chairman, I would like to submit my statement for the record and briefly summarize its principal points.

Senator **BREAUX**. Without objection, so ordered.

Mr. **ZECH**. The NRC relationship with the nuclear industry should be one in which NRC encourages excellence and performance and quality workmanship, it works with industry to improve safety, demands compliance with regulations, and moves promptly and vigorously with enforcement actions when warranted.

Our responsibilities as a regulator require frequent communication with the regulated industry to ensure prompt and effective resolution of safety issues. At the same time, the regulatory process must provide an accessible avenue for the expression of public concerns and an adequate response to those concerns. It must not give preferential treatment, real or perceived, to any group or person. Such communication, which is generally open to the public, must be conducted in a business-like and professional manner.

The NRC's commitment to an open communication process was originally articulated in two policy statements in 1978. Since 1978, additional guidance documents have been issued and implemented to ensure that NRC management and staff conduct themselves professionally and in accordance with our statutory mandate. A list of examples is attached to my prepared statement.

To further improve our performance, an effort has been initiated to consolidate the existing and proposed guidance on relationships with the public and the licensee. In May and June of this year, I reiterated to all NRC employees the requirements for professionalism and the performance of NRC regulatory duties and for arms-length communication with those that are regulated. Copies of those announcements are also attached to my prepared statement.

I believe that our regulatory interface with the nuclear industry has been above board, and our safety decisions have consistently been made available for public scrutiny. We intend to ensure our future activities are conducted in a like fashion.

Your invitation, Mr. Chairman, asked that the Commission discuss the use of policy statements in lieu of rules. Policy statements have been used by NRC to accomplish a wide range of objectives, for example, to establish a safety goal and to encourage plant standardization, as well as to encourage industry initiatives.

To be effective, a policy statement must provide adequate guidance on what is expected, be based on an industry or program effort acceptable to NRC, be aggressively monitored and evaluated by NRC and detail an effective enforcement policy.

With these elements, a policy statement can be effective to implement sound regulatory objectives, can be implemented more quickly than a rule and can conserve government resources. It may be particularly useful in dealing with issues such as training and maintenance, where a variety of approaches attuned to local conditions could have equal validity.

Whether or not the regulatory policy is set forth in a policy statement or in a rule, there is no effect at all on our authority to order corrective action. Because the policy statement is not adopted in accordance with the rule-making procedures of the Administrative Procedure Act, it does not constitute or change regulatory requirements. Therefore, nothing in a policy statement limits the authority of the NRC to issue orders, call enforcement meetings, suspend licenses or take other enforcement action when regulatory requirements are not met or a safety problem is found.

There are no set guidelines for determining whether a rule or a policy statement is more appropriate for dealing with a particular issue. The practical approach depends upon the circumstances of the individual case.

A rule is more time-consuming to put into place than a policy statement. To some extent, a rule may require more resources for development and to ensure compliance through monitoring inspection. With a policy statement, the Commission can monitor the progress toward certain goals while letting the licensee use a variety of approaches to achieve those goals.

With the variety of utilities, plant designs and regional characteristics in the United States, some flexibility in permitting licensees to develop varying approaches is frequently appropriate.

Finally, you asked that our testimony explain how appropriate enforcement actions are decided upon and undertaken once the violation of a Commission regulation is discovered. An explanation of the enforcement policy and procedures of the NRC and its staff in initiating enforcement actions is set forth in Appendix C to Part 2.

With your permission, Mr. Chairman, I would like to submit that appendix for the record.

Senator BREAUX. Without objection.

Mr. ZECH. Mr. Chairman, that concludes my prepared statement. My fellow Commissioners and I would be pleased to respond to any questions the Subcommittee may have. Thank you, Mr. Chairman.

Senator BREAUX. Thank you for your statement. Do any other members of the Commission have any additional statements at this time?

[No response.]

Senator BREAUX. Admiral, on page 4 of your statement, you point out in the second paragraph, "In deciding on a rule or a policy statement, a central consideration is how can we best achieve the desired results?" and you outline some of the special considerations in trying to reach that goal.

One of the things that you point out is the question as to whether the expertise lies within industry or with the NRC with regard to coming up with a rule or a policy statement.

I guess that is a little troubling on its face. With the size of the NRC, the amount of money that you are authorized and appropriated, the number of technical experts that you have within the NRC, what do you mean when you refer to areas that the industry has expertise in that apparently you as the regulating body does not possess.

Are there examples that have occurred that you did not have the ability to make policy decisions with regard to regulation, that you had to go to the industries that you are regulating and say, "Tell us how we should be regulating you?" In effect?

Mr. ZECH. Mr. Chairman, let me use, as an example, the training policy that we, in 1985, put in effect which did consider where does the expertise lie.

The utilities for many years, of course, have been conducting their own training programs. NRC does training. We train our own people. We train our own people at Chattanooga. We have a training facility there. We essentially train NRC staff members to become good inspectors and to carry out the responsibilities they are assigned.

For many years, the utilities have been doing their own training at their own simulators and have their own training programs. They have developed a certain amount of expertise over the years in training their own people. We monitor that training. We issue licenses to their operators; we monitor the exams; we review the exams; we are involved in that oversight capacity. But the utilities themselves have developed training programs.

Senator BREAUX. I understand who does the actual training, but the real issue is what should go into that training program. That is the policy question, not who runs the training program. I am glad industry has them. What that training program is comprised of, what ingredients go into making a training program is a decision, I would take it, would be an NRC decision.

Mr. ZECH. It is. It is, Mr. Chairman.

Senator BREAUX. What are you talking about when you have a question about whether or not the expertise lies with the NRC or the industry in your statement? Just what does that mean? It tells me that you are saying there are some areas that you don't have expertise in.

Mr. ZECH. No, I didn't mean that at all. In the use of the word "expertise", I mean that the utilities are actually doing the training. We at NRC are monitoring the training.

Senator BREAUX. Let me ask you a question. Is there any area that you do not feel you have the expertise in with regard to regulation of the industry for the protection of human health?

Mr. ZECH. No, sir. Our expertise is in the regulatory side of it, Mr. Chairman.

Senator BREAUX. I am talking about who conducts the training programs.

Mr. ZECH. Yes.

Senator BREAUX. I am talking about who sets the standards by which those programs have to be run.

Mr. ZECH. We do that. We do that, and they have to meet our standards.

Senator BREAUX. On page 4, you also indicate that the Commission issued a Policy Statement on Training Qualification of Nuclear Powerplant Personnel which established an enforcement policy.

What I would like you to do is to outline for the Committee the elements of this particular enforcement policy. I think that regulation is only going to be as good as your ability to enforce, so you have a policy statement in this area. It has to be enforced with some mechanism. Tell me how this policy statement can be enforced.

Mr. ZECH. If the training is not being conducted in a satisfactory manner, we do such things as, or have the authority to do such things as revoke licenses of those that are trained. We can go so far as to shut down a plant itself if we are not satisfied that the training program is being conducted appropriately.

Perhaps the most recent example of our ability to carry out our responsibilities and authority we have, without relying on a rule, is the Peach Bottom case, where the operators were inattentive and allegedly sleeping. That is still being investigated now, as you know, but when we found that out, there was no rule that we had that we were relying on; it was simply, we were concerned that the public health and safety was not protected.

That is our responsibility. When that is a concern, that is all the enforcement we need to carry out our responsibilities.

Senator **Breaux**. Okay. That points to one of my concerns, Peach Bottom. You had a set of rules and regulations that said, "train your personnel," basically, "run a training program; make sure that it is the type of program that is approved by INPO."

They didn't do that, or if they had a program, the end result was that it was not working as the training program was designed to have it work.

Your statement says that in that situation, when there is a violation, you can revoke the license or you can shut down the plant. My concern is that it seems as if that is a sledgehammer type of approach to a problem that perhaps would best be handled in a different manner.

Do you have the authority, in that case, to invoke civil penalties on that particular type of incident?

Mr. **Zech**. Under a policy statement, we do not have civil penalty authority. We have other authorities we can use, Mr. Chairman. What I mean is that we don't necessarily rely on civil penalties.

We have plenty of authority to protect the public health and safety.

Senator **Breaux**. Yes, when you can shut down the plant.

Mr. **Zech**. We don't have to go that far. We can do other things.

Senator **Breaux**. Can you define them?

Mr. **Zech**. We can talk to utilities; we can tell the utilities that unless they take action that is satisfactory, we will take more severe action. Usually, those conversations with the utilities produce results, but if they don't, we do have ultimate authority.

Senator **Breaux**. My concern, and you didn't answer the question, is do you have the authority in the policy statement for infractions, to invoke civil penalties?

Mr. **Zech**. We do not have civil penalty authority under a policy statement.

Senator **Breaux**. So what you are telling us is that when these situations arise, from an actual enforcement standpoint, that you can revoke the license or you can shut down the plant, or you can talk to the utilities and say to them, "Look, if you don't take actions to change this infraction, we are going to hit you in the head with a sledgehammer."

I am concerned that a policy statement does not give you the day-to-day operational tools in which to correct problems that may be justifiable in shutting down the plant but maybe something far less than that to get their attention.

Mr. **Bernthal**. Mr. Chairman, let me make a comment here.

Senator **Breaux**. Commissioner Bernthal?

Mr. **Bernthal**. One of our departed colleagues a few years ago once made the statement, "We can do anything." Well, I thought that was somewhat an overstatement of the Commission's powers, but there is no question that the Commission can take enforcement actions in a case like Peach Bottom with any degree of grayness or gradation between plant shutdown and a slap on the wrist. We have that full authority.

Senator **Breaux**. Do you feel you can impose civil penalties?

Mr. **Bernthal**. We certainly can, because in that case, there clearly was a question of whether the utility was performing in conformance with its license requirements.

Senator **Breaux**. That is a difference from the Chairman of the Commission. He said that you do not have the authority to impose civil penalties on the violation of a policy statement as opposed to some rule or regulation.

Mr. **Bernthal**. We didn't have a rule against operators sleeping, and I doubt—well, I suppose we could write, "Thou shalt not sleep on the job," but we don't need a rule to bring any kind of enforcement action that we choose if we find operators asleep at the console, I can assure you.

Mr. **Zech**. Mr. Chairman, if I may.

Senator **Breaux**. Mr. Chairman?

Mr. **Zech**. Generally speaking, it requires a rule to use civil penalties. I think that is perhaps an oversimplification, but that is the way I think it should be looked at.

In the case of Peach Bottom, because the operators themselves were licensed by us under a regulation, we could have initiated civil penalties on them, and we may do that.

The same would hold true as far as the licensee at Peach Bottom. They operated the plant, apparently, allegedly, to perhaps the detriment of the public health and safety.

Under that, we could issue civil penalties. But generally speaking, unless you have a rule, and I am referring to the rules we would have under those circumstances for Peach Bottom, but generally speaking, under a rule, you can issue civil penalties, and under a policy statement, you cannot.

In that case, I am referring to the regulations that would apply to Peach Bottom.

Senator **Breaux**. In the revised policy statement, Mr. Chairman, for enforcement actions, the Commission has decided to allow for the consideration of mitigating circumstances before you impose any civil penalties for a Severity Level I violation.

Previously, this had not been the case. Thus, for all five levels of violations within the existing enforcement framework, licensees can seek to avoid an imposition of the maximum penalty established by law, which is a $1,000 a day fine.

Could you explain for the Committee the rationale behind the allowing of mitigating circumstances for decreasing the severity of a civil penalty?

Mr. **Zech**. Yes, sir, I think so; I will try.

In reviewing alleged violations of our regulations in the case where we do indeed have civil penalty authority we do take into consideration a number of factors. Let me give you an example of just a couple of them.

First of all, did the licensee itself report the violation, or was it necessary for us to find out about the violation? If the licensee itself reported the violation, it does make a difference. It depends on what he said, how long it had been taking place and whether there was a good-faith effort to take action immediately.

If he reported himself, if he took immediate action to correct it, those things are considered in mitigating a possible penalty. In addition, the performance of operations over time is considered. Some of our plants do operate in a truly outstanding manner over many, many years, and if a violation is alleged to be in the "understandable mistake" area or something that was not certainly completely careless and negligent, that would be, perhaps, mitigating circumstances. So I am saying that we look at it on a case-by-case basis.

There are times when it seems that common sense and the good judgment would dictate mitigation.

Senator **Breaux**. In that same revised policy statement, you set out a statement that indicates that the Commission will reopen previously closed investigations when new information is made available to the Commission regarding that investigation, indicating that some remedial action is needed to protect the human health and safety. That is fine.

But it goes on to say, or it can be reopened when there is an indication that a severity level of the violation should be downgraded. But the Commission has also stated that in the situation where new evidence indicates that an increase in the severity level of the violation or the imposition of an increase of an already-assessed civil penalty is warranted, that enforcement action would normally not be reopened.

What I need is some explanation of the rationale that says you have the authority and will, in fact, reopen investigations when it is determined that a less severe penalty may be required which you will not do so when the evidence indicates that a greater penalty should be assessed. It makes no sense to me at all. Am I reading it wrong, or do you have a rationale for that?

Mr. **Zech**. You are reading it right, Mr. Chairman. It is a judgment call, I think. Most of us find that the experience we have had with enforcement is not all that satisfactory. We try to make enforcement prompt and fair, but we don't make it as prompt as we would like to.

Often, enforcement cases come up several years after the incident. At that time, it has been 2 years or perhaps less or perhaps more from the incident. We issue a release that we have signed a civil penalty. It always reopens the publicity and the case again. Everyone is involved and concerned about a plant that may have been, for 2 years, operating very well; we are talking about something that was 2-years old.

It causes a lot of, perhaps, unnecessary concern. But we feel that even though it is not as timely as we like, it is responsible action on our part to call attention to these incidents. If it does come up that perhaps it was more severe than we thought it might have been, in my judgment, perhaps the attention that has been brought to it is warranted. If there is no new information that would cause us to be concerned that more severe incidents will result unless there is more severe action, in my judgment, the action that has previously been taken is sufficient.

Senator **Breaux**. Admiral, I understand that, but with all respect to the Commission, I think it is almost ludicrous for you to have a policy statement that says that if new evidence is submitted that justifies opening an investigation, that that evidence indicates reducing the penalty; we will reopen that investigation. We probably will have no problems with that.

But to follow it up by saying, however, if the evidence indicates that an increase in the penalty should be considered, we are not going to open it up.

Mr. **Zech**. If I recall, the wording, I think it says, if new evidence is introduced, then it is a new ball game. If there is new evidence introduced, then, of course, we could make a more severe penalty.

But if there is not new evidence——

Senator **Breaux**. I don't read the policy statement like that. The policy statement said, if new evidence is not great enough, then we are going to reopen the investigation. I read it as saying that if new evidence indicates that the penalties were too severe, that we will look at it. But if the evidence indicates an increase in the penalties should have been justified, then we are not going to look into it.

Mr. **Zech**. No, sir. It is my understanding that if new evidence is introduced or new circumstances present themselves, we can start a whole new proceeding.

Senator **Breaux**. Let me read what it says, and you can interpret this, because I don't read it like that. "Reopening closed enforcement actions." That first paragraph states the general statement of what you are doing, and I am reading from the Federal Register of Monday, September 28, 1987, Rules and Regulations.

> The Commission believes that reopening a previously closed enforcement action may be appropriate under certain circumstances. If significant new information is received by the NRC which indicates that an enforcement sanction was incorrectly applied, that action could be reopened to correct the record. No problem.
>
> Reopening should occur only: One, if the remedial action in the form of an order is necessary to abate the continued harm of the violation to the public health and safety, the common defense and security or the environment; or, two, if new information shows that a violation was less serious than originally believed or that it did not occur. Enforcement action would normally not be reopened where the only change to the prior action would be to increase the severity level of a violation or to impose or increase its civil penalty.

That sounds pretty clear to me that you are proposing a regulation that says: If we think that we did too much, we are going to reopen it, but if we think and evidence indicates that the change would be to increase the severity level of the violation or to impose or increase a civil penalty, we are not going to do it.

That is what that tells me.

Mr. **Bernthal**. Mr. Chairman, let me make a comment here. The insertion of the word "normally" there was a modification that I believe I proposed. I did not endorse the original form of this document, which, I think you are quite right, would have categorically excluded ever reopening a civil penalty or a case where such reopening would be in the interest of making the original finding more severe.

The insertion of the word "normally" there certainly met some of my objections to the original wording, and at least, I think, that does allow some room for judgment, now, on the part of reopening, even in a case where a matter might be reopened to impose more severe penalties.

But the original version I found unacceptable. It would have categorically excluded reopening under circumstances.

Senator **Breaux**. I think back. Every time I read it, it is ludicrous, it really is, because we are saying, a closed enforcement action is going to be reopened if we are going to reduce the penalty, but it is not going to be reopened if there is any prospect for increased penalty.

If we are going to reopen them, we ought to open them to increase penalties or to downgrade them. This is a total lack of balance in which we are reopening hearings.

This, in my civilian look at it, from my position, is that you can't justify that. Please tell me how you do.

Mr. **ZECH**. There is no intention for there to be a lack of balance, Mr. Chairman. The intention that I read into it, and we all agree with the word "normally" is to put judgment into it, and we intend, if there is new evidence that shows that it is more severe than we thought, we could open a whole new hearing and go to a much higher severence level.

Senator **BREAUX**. But that doesn't say that, though. It doesn't say that you have the judgment.

Mr. **ZECH**. It should, Mr. Chairman. That is what is meant by it. Perhaps we should look at the wording again. It was my feeling that we had a very sensible policy statement in that regard, very sensible wording.

But if it reads that way to you, and perhaps it is something, of course, that we should look at. The intention is if new evidence is there, we can start over again. That is the intention.

Senator **BREAUX**. New evidence, because this doesn't say that. I think we can all take a vote here and agree that this sets a different standard for reopening an investigation if the evidence indicates that the penalties should be increased or that the requirement should be increased. That is what it says.

Mr. **ZECH**. We will certainly take a look at the wording, Mr. Chairman. If that is the way you read it, that is important. That is not what we intend. If there is new evidence, it is clear to me we can reopen it. If it is not clear to you, I can tell you we will take a look at it.

Mr. **BERNTHAL**. Mr. Chairman, I have got to stress, the original form of that was more eggregious than the present form. I think the best compromise we were able to get was the insertion of the word "normally".

Senator **BREAUX**. Are you saying this same thing was discussed at some point within the Commission?

Mr. **BERNTHAL**. There is no question it was discussed, at least by paper; it was discussed on vote sheets.

But I would like to point out the other side of this story, and that is that I think the outcome here is indicative of a problem that seems to be growing where we try and define every conceivable circumstance for a procedure or a rule or a policy in this Commission instead of taking rather rare cases on a case-by-case basis and making the best judgment that we can.

There were a number of complaints on the part of various Commissioners, and myself included from time-to-time, that in a very late and untimely manner, the Commission would come in with a decision on a violation that might have been sitting before the staff or perhaps before the Commission for a year or a year and a half, sometimes even longer.

This, we felt, wasn't fair. And I think that is the sense that lies behind the language which was originally proposed, which I felt went too far, and the compromise before you does at least allow us a loophole now, I think.

Senator Breaux. Is it improper just to say that the Commission has the authority to reopen an investigation if new evidence indicates that the incident was less serious or more serious or that the penalties should be more or less on equal footing?

Mr. Zech. No, not at all. And as I say, Mr. Chairman, it is my understanding that if new evidence is there, we do have that authority, but we will certainly look at that wording again.

Senator Breaux. Look at it, and please let the Committee know what is going to be done as a result of that.

Mr. Zech. Yes, sir; we will do that.

Senator Breaux. I think that it should be approached in a balanced manner. This wording, to me, is clearly not balanced, and apparently, discussions were held with regard to that very point.

My final question on this enforcement policy statement relates to the type of violations that fall within the various severity categories. I think we have five categories, that the Commission is saying that for Category I through V, Category I will be the most serious violations down to Category V, and certain proposed types of penalties with regard to violations at fault within those categories are set out.

I have been led to believe, and I think properly, that when it comes to this industry, that it is not so much a hardware problem with regard to the technology as much as it is the potential of serious mistakes occurring because of the human factor, human errors. People make mistakes and probably make more mistakes than technology fails.

I think that is an impression that a lot of people within the industry have given me, and I agree with that. When I look at the categories of severity, however, it seems that the two most severe categories of violations, Categories I and II, are all related to hardware, and the first time that a human problem or human errors are phrased in the policy statements, they are referred to as a dereliction of duty, and that enters into the picture of Category III severity, which starts with a base civil penalty of 50 percent of the statutory maximum.

I guess I need some discussion as to why, if we agree that the human factor and human errors are some of the most severe problems, that they don't appear until the bottom half of the severity categories.

Mr. Zech. First of all, Mr. Chairman, you are absolutely correct when you relate to the importance of the human error in operation of our nuclear powerplants. I would point out that there are hardware problems from time-to-time; there are design deficiencies from time-to-time, too. But in reviewing the accidents, certainly, the human element plays an important role in many of the events that have occurred.

As far as I am concerned, you are correct, too, in describing the severity levels. As far as I am concerned, there is no intention of excluding human error in the upper severity levels. My feeling is that reading it from the bottom to the top that they become inclusive, as you go on up. Perhaps it would be useful to bring emphasis to that point, but certainly, there was no intention of excluding human error or human mistakes or negligence in the highest levels.

Those are certainly, as far as I am concerned, considered to be inclusive as you go on up to the severity levels.

Senator **Breaux**. Well, you say that it is inclusive, but when you spell out categories, I take it of severity, it is to list the most severe with the greatest penalties down to problems that are severe, but not as severe as category 1.

I am just saying that if you agree that the human element and errors that we as humans make are the principal or at least the first link of concern as to why things go wrong, why shouldn't that be at the top? I am just saying, we think human problems are the biggest problem. Why shouldn't that be in Category I?

Mr. **Zech**. We agree with your thinking, Mr. Chairman. There is no intention of excluding human errors from the top categories. I would think they would automatically be included because of the fact that they are already in the lower severity areas.

Mr. **Bernthal**. I think it is clear that the capacity for human error is included in severity level I and II. Arguably, TMI was substantially human error, so there is no question that human error, which leads to severe safety malfunctions and severe accidents, can very easily be subject to Category I or Category II fines. At least that is my judgment, and I would place TMI in the category of exhibit A.

Senator **Breaux**. I agree with what you are saying, and I think perhaps with some elaboration or clarification of that in the setting out of these categories, that it is not intended to include a human error which causes an equipment failure to fall within a Category I violation.

Mr. **Bernthal**. No, certainly not. In fact, arguably, anything that happens in a power plant is ultimately human error. It might go back to the design, but it is human error, so you certainly can't exclude human error.

Senator **Breaux**. I think perhaps we could look at, from a clarifications standpoint, that that is clearly the intent.

Mr. **Zech**. Mr. Chairman, if I may make one last point on this subject. Perhaps in the Severity Level I violations as it is written in our regulations, it says this, for example: Safety-limited is defined by 10 CFR 50.36 and the technical specifications being exceeded, well, that could be by human error; there is no question about that. If they are exceeded, that could be human error.

Senator **Breaux**. I think if we spell that out, it would be helpful to show that, just as the situation you just described.

Mr. **Zech**. It also refers to an accident that is time-critical, which, of course, could be caused by human error. We will certainly take a look at that. We certainly want to be clear about that, Mr. Chairman.

Senator **Breaux**. Let me, Admiral, move to the final area I would like to get into with you.

I have some general questions with regard to procedures that the Commission follows in formulating the rules and the regulations and the participation of the public in that process of formulating these rules and regulations.

I understand that in recent years, the Commission has followed a procedure that is known as an informal rule-making procedure rather than a formal rule-making procedure; is my understanding correct in that?

Mr. ZECH. Yes. That is correct, Mr. Chairman.

Senator BREAUX. When the Commission decides that it may wish to promulgate a new rule or regulation, say, for example, a rule on material false statements, I take it that you would normally instruct the staff to prepare a draft of the rule reflecting the views, often through a document called a staff requirements memorandum.

Mr. ZECH. Yes, sir. That is correct. That is our procedure.

Senator BREAUX. Then the staff would prepare what would be called a SECY paper, by which staff provides an actual draft of that proposed rule to the Commission.

Mr. ZECH. Yes, sir.

Senator BREAUX. What happens after the SECY paper on that draft rule is published to the Commission? What happens? Does it have a due date to report back on it from the Commission members? What happens to that SECY paper after it is proposed?

Mr. ZECH. The Commission would review the proposed staff paper. We would attempt to resolve our own differences, if any, either agree or disagree or change, as necessary, the statements in the staff paper, and after we got a Commission position, we would put the proposal out for public comment.

Senator BREAUX. The Commission would take a vote on the proposal within the Commission?

Mr. ZECH. The Commission would attempt to resolve or to get a consensus on the position so that our differences, if any, could be incorporated and then put it out for public comment.

Senator BREAUX. It would, but if there is disagreement within the Commission on the proposed rulemaking, I take it there would be a vote on the proposed rule and it would take a majority, I guess, to send it out for public comment?

Mr. ZECH. Yes, sir. Yes, sir.

Senator BREAUX. Prior to the Commission approving this new proposed rulemaking, would the staff requirement memorandum, the first step pertaining to the rulemaking, be made available to the public? Would that be something that would be a public document?

Mr. ZECH. I think the best way I can answer that, Mr. Chairman, would be for significant positions, it would be. I don't think necessarily it would be for all. I, perhaps, would have to check with my experts on that.

Senator BREAUX. What about the SECY papers? Would they be made available to the public, the SECY step?

Mr. ZECH. Not necessarily all of them. In other words, the internal actions are not necessarily all made public. When we pet out a proposed rule, of course, it would be made public.

Senator BREAUX. I understand that. I am talking about the events leading up to the proposed rulemaking.

If they have to vote on a proposed rule within the Commission, would the Commissioners' votes be made available to the public, or is that something done internally?

Mr. ZECH. No, not necessarily the vote sheets, but we would do our voting in a public session.

Mr. BERNTHAL. Proceeding.

Mr. ZECH. Predecisional things would not necessarily be made public, but voting on a rule would be in a public session.

Senator BREAUX. When you develop any rule within the Commission at the proposed rule stage and it hasn't been put out for public comment yet, are the Commissioners normally free to discuss the merits of the proposed rulemaking with people outside the agency for comments prior to the time it is published for public comment?

Mr. ZECH. Yes, they are.

Senator BREAUX. What about the vote sheets of the Commission members? Are they made available to the public, or can they be made available to the public?

Mr. ZECH. Not ordinarily, Mr. Chairman.

Senator BREAUX. So if I to try to understand all them, the SECY papers, which is the final process leading up to the proposed public rulemaking, are not necessarily made available to the public, and neither are the staff requirement memorandum made available to the public?

Mr. ZECH. No, they are not necessarily all made available to the public. We have a certain amount of predecisional matters that are undertaken by the Commission. It is not necessarily made available to the public.

Senator BREAUX. And the vote sheets fall into the same category?

Mr. ZECH. Yes, they do.

Senator BREAUX. The reason why I am trying to assertain what the position of the Commission is on the process leading up to the public rulemaking is because of some things that have been brought to the attention of this member with regard to the proposed rulemaking on material false statements.

We have a letter addressed to one of the utility companies from a Mr. Mark Wetterhahn dated July 16, 1985. In their letter dealing with the proposed rule on material false statements, the attorney goes into a number of matters that brings this policy into question. I will make the letter a part of the record so that the entire letter can be reviewed. (See p. 290.) In his letter to the utility company he points out a number of things that occurred prior to the proposed rulemaking meeting being made available to the public.

He points out—

> On May 7 and 8, we learned that Chairman Palladino voted for all three components of the proposed rule, Commissioner Zech voted for the first and third components of the proposed rule, and Commissioner Bernthal was believed to be the key vote, and that Commissioner votes were due by May 10. Accordingly, Don Knuth of KMC and Jessica—

that is referred to later in the letter—

> Met with Commissioner Bernthal on May 9. Jessica and Don urged Commissioner Bernthal to vote to delay the issuance of any proposed rule on material false statements until after the Commission had received the recommendations of their Advisory Group on Enforcement Policy.

The letter continues about the advisory group and how it is staffed, and it continues by saying—

> Our intervention was successful as, the day after Jessica and Don met with him, Commissioner Bernthal voted to delay issuance of a proposed rule until after receipt of the Advisory Group's recommendation. Prior to the May 10 due date for Commis-

sion votes, Jessica also spoke to the legal assistants to Commissioner Roberts and Commissioner Zech concerning the problems with the proposed rule on material false statements.

I would point out that this particular proposed document, proposed rulemaking, SECY 85-149 on May 3, 1985, was circulated into the NRC's document control system with an indication that "control file only".

SECY 85-149, the document talked about, was not placed in the public document folder at this time. On May 15, 1985, SECY 85-149 was put into the NRC public document room, in a SECY paper file with the notation "to be released with open NRC transcripts." The Commission's individual vote sheets were not placed in the file at that time.

In June of 1985, a Freedom of Information Act request from a group inside NRC for these papers were filed, and in February of 1986, that Freedom of Information request was withheld in its entirety, although one of the Commission's individual vote sheets was released at his discretion, but definitely not the vote sheets of the other four Commissioners.

This whole scenario seems to tell me that some people have access to individual documents, individual vote sheets and were involved in an internal process, lobbying on this proposed rulemaking on material false statements prior to the time that it was ever made public.

Then when other groups tried to get a Freedom of Information request for information that was already out on the street, pretty clearly, the entire Freedom of Information request was denied.

This has some conflicts with regard to how I think you were telling me that things should operate. I need some discussion on this. Am I correct in what I have outlined? Is my information incorrect?

Mr. ZECH. Well, as I can recall, Mr. Chairman, first of all, when we consider a generic rule change, which that specific item was, we are performing in the legislative capacity, not in an adjudicatory capacity.

So it is my understanding that when we are doing that, we can communicate with any one interested in the process. Therefore, the ex parte provisions are not involved. So as far as I can recall, I don't think there was anything improper about the communications that took place in that regard.

Mr. BERNTHAL. That is right.

Senator BREAUX. I am not talking about ex parte communications. I want to make that clear. What I am talking about is it seems that a great deal of access was had to Commission members to the documents and internal workings and the process by which proposed rulemaking are arrived at. But yet when a Freedom of Information request from someone was submitted to ask for, essentially, that same information, it was denied in its entirety.

It seems as if, on one hand, we let some law firms have access to all of it, but when another group files a Freedom of Information request later on for essentially the same information, that that Freedom of Information request was denied. I am not really criticizing these individual contexts in the rulemaking process.

Maybe that is appropriate, but when some other group filed a Freedom of Information, an official request, for that information, it was denied in its entirety.

Mr. **Zech**. Let me say, offhand, I don't recall all the circumstances, Mr. Chairman, but it sounds to me like it should not have been denied. Again, I would have to review the case. It seems to me that you are absolutely correct. I would agree with you. I just don't recall why it was not released or why we made the decisions we did.

Perhaps it was a mistake on our part, but it seems to me that it might have been releasable. I would have to review the circumstances.

Mr. **Bernthal**. Mr. Chairman?

Senator **Breaux**. Mr. Bernthal?

Mr. **Bernthal**. The general policy of the Commission is that it does not release pre-decisional documents. Certainly, as a discretionary matter, we could release any vote sheet on any subject, I suppose. As you correctly point out in that case, one Commissioner did do that.

I think generally, the Commission felt this is the last remnant in the processes that we are permitted to go through and have some sense of give-and-take and that is the vote sheet, in the voting process.

In this particular case, I wanted to stress what the chairman has already pointed out. This was a rulemaking. I, for one, since my name came up in this context as well, from the time I joined the Commission have had an open-door policy, and have stressed that repeatedly that on matters where it is appropriate, such as you have got a problem with a rule, you think something is wrong with the way the Commission is doing things, my door is open, and I am there for you to talk to.

I think that is good. I think it is essential that the Commission remain in a position of access to the public throughout these processes, as opposed, as you correctly point out, to the adjudicatory procedures where there are rather strict provisions against off-the-record contacts.

I would also just make the comment that there are a number of self-serving statements made by lobbyists in this city from time-to-time, and they all fall in the category of after the fact claims of success, and I think if any of us, if any member of Congress were able to delve into all the times that someone has claimed success for some effort on the Hill or anywhere else, it might make everyone look a little foolish.

I can assure you that the influence of this sort of thing is vastly overblown. I think the record and the vote on that particular case shows it.

Senator **Breaux**. I almost expected to see a bill at the bottom of this letter.

I am looking at the policy question of access into the internal workings of a proposed rulemaking as it progresses through the process; access to the SECY papers; access to the staff proposed memoranda; access to how members are likely to vote or access to the vote sheets. Maybe there is access to one group, but not to another group.

When they filed the Freedom of Information request seeking the documents, apparently it was denied. I think the appeal was denied. I am just trying to see if we have a level policy with regard to these internal workings.

Somebody can send a letter and say, "Look what I found out." Another group says, "I can't find this out." I am just trying to find out if there is a way to correct that problem. I think it seems to have been a problem in this case. If it is, if that occurred as I outlined, how do we correct it? Does it need to be corrected?

Mr. ZECH. Mr. Chairman, if I may just briefly respond, I agree with Commissioner Bernthal in his reference to the predecisional-type considerations, and those are things that we do think about. Is it a public decision or is it releasable? If the documents you referenced had been put into the public document room, certainly, then, there is no reason that they shouldn't be released under the Freedom of Information Act. I just don't recall the circumstances in that case.

I can just assure you, though, that we try to be as fair as we can and as straightforward as we can in not giving one group or another any type of opportunity to have more influence. It is a judgment call on our part, but if information was predecisional, it is quite likely that we thought it should remain in that category.

On the other hand, if it was in the public document room and it was releasable to the public, there is no reason that we shouldn't have responded.

Senator BREAUX. There obviously may be other facts in requesting information that I am not aware of, but a Freedom of Information request for these types of materials that I have just outlined would go to the NRC, I guess.

Mr. ZECH. It is generally responded to favorably in a large number of cases. I just don't recall this access case.

Senator BREAUX. As I understand in this one, it was requested and it was denied, and then they appealed it. Would the appeal go to the NRC Commission again?

Mr. ZECH. Yes. We take another look at it. The appeal, would, indeed, come back to us.

Senator BREAUX. You had two shots at it in this case before it was denied.

Mr. ZECH. Apparently so. Apparently so, Mr. Chairman.

Mr. BERNTHAL. Mr. Chairman, I want to make two comments, though. There is a level playing field here. It is one of the strange things, and I wish it weren't this way, that for some reason or another various groups seemingly don't scatter their contacts in a uniform basis throughout the Commission, because one or another Commissioner is perceived as being more favorable to their cause. But I can assure you that if anybody, any person opposing the rule in one direction or another, had asked for an appointment with me, and I suspect any of my colleagues on this issue, of course, we would have met with them and listened to them.

On the other hand, if I may just continue, if any of the groups, including this particular lobbying firm, had lodged a Freedom of Information request for vote sheets, it normally would have been denied, like it is for anybody else. We do not normally release vote sheets to the public. That is considered a predecisional document.

Senator **Breaux**. The problem is that in this case, as outlined by the letter from the attorneys, spelling out how individuals were likely to vote, saying that, in fact, how they voted, commenting on the SECY papers, commenting on the staff documents, obviously, they had pretty much everything. How people were going to vote; how they actually voted; the contents of the staff memorandum; the contents of the SECY papers, one group had all of that.

Mr. **Bernthal**. On nonadjudicatory matters, Commissioners are certainly free to represent their positions at any stage in the process. Every Commissioner has done it. If the Commissioner has a firm position and perhaps has already voted on a nonadjudicatory matter, anyone that wants to go around or has friends with a particular contact can sort of add up the votes and add up the poll and get a pretty good sense of how individual commissioners may have come out.

They may have been asked a question in a speech they gave somewhere and said, "Well, my position on this non adjudicatory matter," I hope, "is the following," in which case, there it is on the record.

Senator **Breaux**. It is no problem, perhaps, with that. I am not arguing that point. I am saying one group, apparently, had all the predecision documents in this case, all the papers that led up to the final proposed rulemaking. They had access to it; the letter points out what it contained.

And yet when you have another group that files an official public Freedom of Information request, that official request was, in fact, denied. I am saying that doesn't seem to be a level playing field.

Mr. **Bernthal**. I don't know what papers they had, and I doubt seriously they had a vote sheet. I expect, they may have, by individual contacts, been able to ascertain how different individuals were coming out.

Mr. **Zech**. Mr. Chairman, the fact that the documents were not released under the Freedom of Information Act very likely, from what you explained and what the circumstances were that took place, was probably an error. If the document was previously released and made available to the public, there is no question about that.

Our policy is that they are equal access, and I would have to reconstruct the actual circumstances. I am sure there were predecisional considerations made, but if the document was made available to the public, as you have mentioned, and I don't know, but if that was the case, then certainly, the Freedom of Information Act would suggest that we might release that document.

Again, we make every effort to be fair and give equal access.

Senator **Breaux**. Since you don't remember, and I don't expect you to remember the Freedom of Information request, I would like you to take a look at it and just perhaps report back to this Committee.

Mr. **Zech**. Yes, sir, we will do that.

Senator **Breaux**. As to why this information was denied when, apparently, it was available to others. That is all I am saying. I am not arguing about the process of finding out how members voted.

It's like you said, you find out from a speech or you can find out from whatsoever.

I think the letter indicates from the attorneys that they had the SECY papers prior to the time that they were filed for public release, and maybe there is nothing wrong with that.

I am just saying, however, when others requested that type of information and it was denied, that denial was appealed, and the appeal was denied. I think that you need to tell me why in this case it was this way and why in the other case it was not.

Mr. **Zech**. A very legitimate request, Mr. Chairman. We would be happy to respond.

Mr. **Bernthal**. The other point is the place leaks like a sieve, in all honesty. It is not very difficult to find anything somewhere around this town.

Senator **Breaux**. It is all right to plug a leak; but it is not all right to plug Freedom of Information requests.

Mr. **Bernthal**. I agree. I agree.

Senator **Breaux**. Okay. I think that is probably all the things I needed, and I think Senator Simpson has some things that he is going to submit for the record.

Mr. **Zech**. Yes, sir.

Senator **Breaux**. With that, the Commission members will be excused. We thank you for being here, once again.

[The letter previously referred to by Senator Breaux follows:]

Conner & Wetterhahn, P.C.
Washington, DC, July 16, 1985,

Re proposed rule on material false statements.

Mr. James E. Booker,
Manager, Technical Programs, Gulf States Utilities Co., Beaumont, TX.

Dear Jim: This letter is to advise you of the firm's activities concerning the NRC Staff's proposal that the Commission adopt a rule on material false statements. On April 26, 1985, the Staff provided the Commission with a draft rule on material false statements ("SECY 85-149"). The Staff's proposed rule contains three parts:

1. The requirement that all information provided to the NRC be complete and accurate in all significant respects,
2. The requirement that applicants and licensees notify the NRC, within two days of identification, of information having a significant implication for public health and safety or common defense and security, and
3. The definition of a material false statement as an omission or an oral or written statement that is (a) false, (b) has the capability of influencing a reasonable agency expert, and (c) is made willfully.

This proposed rule, of course, will have a very negative impact on utilities. While the requirement that "all information provided to the NRC be complete and accurate in all significant respects" appears at first glance to be reasonable, as a practical matter, we are concerned that inspectors will spend a disproportionate amount of time looking for inaccurate information, rather than safety problems. Moreover, no one knows what "in all significant respects" means. The NRC considers "material" to be anything "capable of influencing a reasonable agency expert." In the past that has meant that information is "material" if the NRC later decides it would have liked to have had the information earlier. "In all significant respects" may be interpreted as encompassing more information or less information than "material." It is also difficult to predict how one could receive a severity Level IV or V violation if the inspector has already determined that the information is inaccurate in some significant respect. Thus, all inaccurate information citations would automatically appear to be at least Severity Level III's.

The requirement that applicants and licensees notify the NRC of all information having a significant implication for public health and safety or the common defense and security obviously is designed to authorize the NRC to continue to second guess utilities when information has not been submitted that the NRC later decides is "significant." This portion of the Staff proposed rule is based on the interpretation of Commissioner Asselstine and others that *Virginia Electric and Power Co.* v. *NRC*, 571 F.2d 1289 (4th Cir. 1978) requires applicants and licensees to provide the NRC with all "material" information. That interpretation is, of course, subject to much valid criticism. Additionally, as presently drafted, the proposed rule does not address any possible time lag between utility identification of information and utility determination that the identified information is significant.

Finally, the portion of the proposed rule which deals with material false statements will penalize both the failure to provide information and oral false statements as material false statements. While the proposed rule has the benefit of requiring any material false statement, to have been made willfully, the inclusion by rulemaking of omissions and oral statements in the definition of material false statement probably outweighs this benefit.

On May 7 and 8, we learned that Chairman Palladino voted for all three components of the proposed rule, that Commissioner Zech voted for the first and third components of the proposed rule, that Commissioner Bernthal was believed to be the key vote, and that Commissioner votes were due by May 10. Accordingly, Don Knuth of KMC and Jessica met with Commissioner Bernthal on May 9. Jessica and Don urged Commissioner Bernthal to vote to delay issuance of any proposed rule on material false statements until after the Commission has received the recommendations of its Advisory Group on Enforcement Policy.

Independent of the NRC Staff's efforts toward adoption of a material false statement rule, the Advisory Group on Enforcement Policy (comprised of persons from outside the NRC and chaired by Admiral E.P. Wilkinson) has been hearing statements from utilities and others on the problems with the NRC's enforcement program. We believe that there is a good chance that the Advisory Group, when it issues its report in August, will advise the Commission that its enforcement practices are counterproductive and that its practice with regard to material false statements far exceeds its legal authority.

Our intervention was successful as, the day after Jessica and Don met with him, Commissioner Bernthal voted to delay issuance of a proposed rule until after receipt of the Advisory Group's recommendations. Prior to the May 10 due date for Commissioner votes, Jessica also spoke to the legal assistants to Commissioner Roberts and Commissioner Zech concerning the problems with the proposed rule on material false statements.

There is still more work to be done. After issuance of the Advisory Group recommendations, there will be a need to urge the Commission to have the proposed rule redrafted to incorporate the recommendations. There will also be a need to convince the Commissioners to change their Enforcement Policy Statement rather than promulgate a rule requiring "all information submitted to the NRC to be accurate and complete in all significant respects."

We plan to continue to work on this important issue and will continue to keep you informed regarding developments. If you have any questions, please let Troy or me know.

Sincerely,

MARK J. WETTERHAHN.

Senator BREAUX. We would like to welcome at this time Mr. Vic Stello, Executive Director for Operations and Mr. William Parler, General Counsel.

STATEMENT OF VICTOR STELLO, JR., EXECUTIVE DIRECTOR FOR OPERATIONS, NUCLEAR REGULATORY COMMISSION

Mr. STELLO. Thank you, Mr. Chairman. If I may, I would offer to have my testimony entered into the record and just give a few brief summary remarks.

Senator BREAUX. Without objection.

Mr. STELLO. I am pleased to have the opportunity to come here today to talk about certain aspects of our NRC program. One point I think is very important is that you see the broad purpose of this area, the idea, is to address the interface of the industry with the NRC. In that regard, I do believe the NRC does use the highest standards of professionalism and integrity in conducting our business with industry.

It is essential that we work closely with the owners, operators and designers of plants we regulate. There is simply no way around it.

It is equally essential that we exercise independent judgment over those we regulate and that we not become captured by them. We are conscientious of both needs, and I have no hesitation in stating that we maintain full independence. If the balance is uneven, it is on the side of too adversarial a relationship rather than one that is too cozy.

There are a number of additional particular issues that you asked that I address. I have done so in my prepared testimony. After further reflection, there is one particular aspect that I believe some background information might be useful on, and that is in the area where we are considering further activity within the NRC in the area of maintenance.

As I reflected on where we were going with the maintenance issue, I thought it might be appropriate to just take a moment and give you some background information on how we got to where we are today. The Atomic Energy Commission, when it established its framework of regulation, put considerable emphasis on what we call safety systems, and they became the basic foundation of the regulatory process. They were the essence of the rules, regulation and license requirements that we issue. It was a conscious decision not to place a great deal of emphasis on what we refer to as non-safety systems or the balance of plant components.

That was believed to be justified for two basic reasons. The first one, I think, is fairly evident: That the utility industry had a great deal of experience in the balance of plant components, because those are the components that are normally used in plants to produce electricity, the condensers, the turbine generators and associated auxiliaries.

We felt that the needed emphasis was already there because it was necessary for those components to be designed and operated to produce electricity. The second reason is that we believe that we had described an envelope of safety such that anything that happened in the balance of plant was such that we would not have a safety problem on our hand; that the safety systems were, in fact, designed to accommodate any problem in the balance of plant.

What we have come to recognize with considerable experience is the number of challenges to the safety system originating with the balance of plant components, and this leads to the area where I believe there is a consensus within the agency and the Commission itself where we need to do more work in that particular area.

This has become part of the issue related to having a new increased emphasis on maintenance. I want to point out, in particular, my view in terms of the FAA analogy, and we will be looking at that as well as a bunch of other alternatives.

There are some complicating issues which we need to understand a lot better before we truly decide on how to finally come to an answer to that question. Those are the edifying comments I wanted to make in my testimony. With that, I am prepared to answer any questions you might have.

Senator **Breaux**. Thank you, Mr. Stello. Mr. Parler?

STATEMENT OF WILLIAM C. PARLER, GENERAL COUNSEL, NUCLEAR REGULATORY COMMISSION

Mr. **Parler**. Mr. Chairman, I have filed with the committee a very brief statement which, if it is incorporated in this regard, I will briefly summarize it.

Senator **Breaux**. Without objection.

Mr. **Parler**. Mr. Chairman, you asked me to address three questions in your letter of last week: The review of the ex parte rules of the Commission as they relate to the formal and informal procurement of regulations, the particular rulemaking procedures, or informal policy statements.

I will address that question first.

Mr. Chairman, as I testified before the subcommittee on May the 14th of this year, when I explained in some detail the Commission's ex parte rule, the Commission's ex parte rule, as presently written, only applies to adjudications: in particular, adjudications which involve the licensing of nuclear power reactors and also, in some instances, formal enforcement proceedings.

The rule as written does not apply to formal rulemaking. If the Commission were to hold a formal rulemaking, I would recommend that the notice of procedures for such rulemaking provide for a policy and procedures like the ex parte rule for adjudicatory proceedings, because after all, the objective of a formal, on the record proceeding, whether it is a rulemaking proceeding or an adjudication, is the same; that is, to have the record of the proceeding be the record on which the decision is based, and to have the decision based on nothing else.

As far as informal rulemaking is concerned, the ex parte rule does not apply. As far as policy statements are concerned, under the Administrative Procedure Act, even the informal rulemaking procedures do not apply to policy statements, and therefore, it is clear that our ex parte rule does not apply to those.

However, for policy statements, the basis for the statement is publicly set forth in the statement which is published in the Federal Register, and also for informal rules also, the basis or purpose of the rule is set forth in the rule as published in the Federal Register.

The second question that you asked me to address, Mr. Chairman, is when and how the Commission decides that a regulation must be developed through a formal as opposed to informal rulemaking. As the chairman testified earlier, that is examined on a case-by-case basis.

I should add, however, that in recent years, the Commission has not decided to initiate a formal rulemaking proceeding. Perhaps the reason for that—or at least a reason—is the 1978 Supreme Court decision in the *Vermont Yankee Nuclear Power Corp.* case, which upheld the Commission's position that informal rulemaking procedures, as specified by section 553 of the Administrative Procedure Act, were adequate.

Therefore, a formal rulemaking proceeding is not required under the Atomic Energy Act, and the Commission has the discretion to go the formal route or the informal route. Regardless of which way the Commission goes, however, the basis for the rulemaking decision has to be in the publicly available administrative record to support the rulemaking action.

The final question that you asked me, Mr. Chairman, was the enforcement implications of the decision to issue a policy statement as opposed to promulgation of a regulation. Whether a regulation is promulgated after formal procedures or informal proceedings, each has the force and effect of law. However, a policy statement does not have the force and effect of law.

The words in the applicable case is, they do not establish binding norms.

Senator BREAUX. Can I interrupt you? What were you saying? Give me that thought again?

Mr. PARLER. For policy statements?

Senator BREAUX. Yes.

Mr. PARLER. They do not have the force and effect of law. In the words of the cases, they do not establish binding norms, n-o-r-m-s. Therefore, a policy statement cannot itself provide the basis for a citation for a violation, and by itself, it cannot be the basis for a civil penalty.

However, the Commission, under the Atomic Energy Act, clearly has the authority by order to take whatever action may be necessary to assure that the public health and safety is protected whether there is a rule present or a policy statement present. The use of a policy statement to address a concern does not deprive the Commission from taking any necessary regulatory action.

Corrective actions could include the issuance of an order or the imposition of a license condition to require that remedial action be taken. Of course, once such an order is issued or a license condition imposed, if either of those were subsequently violated, then those violations would provide the basis for the imposition of a civil penalty or more severe actions.

Mr. Chairman, that completes my summary. I will be pleased to respond to any questions you might have.

Senator BREAUX. Thank you very much for your presentation.

Mr. Stello, I know that in the past that you have indicated that you would prefer to regulate through rules rather than through policy statements, I guess basically because the rules make clear what is required of the licensee and provides some legal authority for imposing any sanctions if they are not followed.

The NRC staff is proposing to issue policy on the maintenance for nuclear powerplants. Would you give me your thoughts on handling this through a rulemaking process versus a policy statement?

Mr. STELLO. At the moment, we are still framing which way to go. Our thinking at the moment—and, I might add, this is very preliminary, we have not presented any such information or a proposal yet to the Commission—is to develop a policy statement that would lay the general framework with the possibility of an advanced notice of proposed rulemaking as an adjunct to it to try to get additional comments on how to try to frame where we ought to regulate further and how.

The reason, I think, that is important to do that is because we have essentially 100 different plants, especially the balance of plant area, where there are a lot of differences between plants. The components that are supplied for the balance of plant come from literally thousands of different vendors who prescribe various levels of detailed information and recommendations with respect to testing and surveillance and maintenance programs.

In many cases, some of these vendors are no longer in business and for each utility it may be necessary to have specific programs that will be unique to each facility. But we just simply do not now know the answer. We are going to be looking at it.

We have suggested, as a way to try to deal with this in a similar fashion, the FAA program where the vendors of equipment can propose particular programs and they can be reviewed and that is somehow adopted. If we can find generic ways to do that, that may be useful.

One of the things that I did want to make clear, in fact, if I can have a moment, I want to make clear that the system of regulation we now have in place and the number of requirements that we have in terms of testing and surveillance of nuclear plants is very comprehensive. What I have is what our current draft of our standard technical specifications that we issue to a plant are when it is licensed.

As you can see, it is a very, very comprehensive document.

Senator Breaux. Is that for maintenance or for licensing?

Mr. Stello. It includes maintenance items in it. I tried to make a rough estimate of the number of inspections and tests that are embodied in the requirements, and as a rough estimate—I would have to give you this, it is very rough—somewhere between 100,000 and one million of those inspections are required by this document itself, in addition to a lot of other requirements that are imposed by the utility.

Senator Breaux. Is that an existing regulation, those standards?

Mr. Stello. When we issue the license, we issue this document as part of that license condition, and when it becomes part of that license condition, it then has the force of and is the equivalent of a regulation. It is completely enforceable, and we have the full range of sanctions that we can use for compliance with these requirements, including civil penalty authority.

Senator Breaux. If that is already in existence, then, why are we proposing a policy statement on maintenance? As I indicated, this is inadequate or not enough or not being handled properly or what?

Mr. Stello. These particular requirements generally are for what I have referred to in my opening comments as the safety systems. We have not taken a parallel effort and done similar things in the balance of plant, that is, for equipment that is normally out, the feedwater pumps, the turbine generators, the condensers, the main cooling systems.

Those are the areas where we are seeing challenges that originate by equipment failures out in the balance of plant area where we think we need to do more work in providing additional maintenance and surveilling and testing requirements.

Senator Breaux. That document does not cover those areas?

Mr. Stello. It does not now, that is correct.

Senator Breaux. All right. So with regard to the maintenance of the plants on a regular basis, requiring certain things be done at certain intervals, is there rules or regulations that are currently in place which have attached to them civil penalties if, in fact, those rules dealing with maintenance are not followed?

Mr. STELLO. For those that are covered by this document, yes; for those, and if I may make a very general statement, in the balance of plant area, the answer is no.

Senator BREAUX. Does the proposed policy statement cover those areas that are not now covered?

Mr. STELLO. The intent is to cover those areas not now covered by this document; that is correct, sir.

Senator BREAUX. But that proposed policy statement covering those areas that are not now covered with regard to maintenance but do not carry with it any civil penalties were they not to be carried out as that policy statement says they should be?

Mr. STELLO. In its initial form, the answer to that question is it would not be covered by civil penalty authority.

Senator BREAUX. Under the policy statement for maintenance on these new areas that need to be covered, how do you enforce those maintenance rules, those maintenance procedures being carried out in a way that the policy statement says it should be?

Mr. STELLO. Well, if we needed to have them enforced, we could issue the order, ordering the licensee to comply with them.

Senator BREAUX. You do that when you issue a policy statement.

Mr. STELLO. No, no. We do not order the utilities to comply at the time of the issuance of the policy statement.

Senator BREAUX. What is the effect of a policy statement if it doesn't require the utilities to follow it?

Mr. STELLO. It is an affirmation of the Commission that it intends to have the utilities follow it. If they do nothing, if we find a recalcitrant utility that doesn't do anything with respect to that policy, we clearly have the authority to then issue an order and make mandatory any portions of the program that we wish.

Senator BREAUX. Why would you issue the policy statement initially saying that these matters should be performed for proper maintenance? Does it not apply to the utility companies who operate these facilities?

Mr. STELLO. Most certainly. It is intended for that purpose. But I think, as the General Counsel already indicated, those do not have the force of law.

Senator BREAUX. That is the question: Why are we doing this major policy statement on maintenance when it does not have the force of law? Is it just so it is there? If it doesn't apply, if it is not something that is issued and saying, "You shall comply with this" why is it, in fact, issued?

Mr. STELLO. I tried to describe that earlier. Let me try to come at it a little bit differently.

We are operating on the basis and the understanding and with more than ample evidence to suggest that the commitment of the industry to do more in this area is recognized by them as well as us. They understand that in the balance of plant area, clearly, there is more that is needed.

It is not clear, however, exactly what needs to be done and how to do it in any way that we feel comfortable that we could formulate a particular set of general prescriptive requirements on a utility-by-utility basis. That is one of the reasons that I indicated that I said at the time we issued the policy statement, one of the things which we are now considering is that at the same time we might issue an advanced notice of proposed rulemaking to solicit and get particular comments on how to formulate and structure such a set of rules and regulations.

We simply, today, do not feel comfortable that we are now ready to formulate those kinds of detailed requirements into rules but, rather, to ask for public comment on how to try to formulate those particular rules.

At the same time, that we would issue a policy statement that we hope that the Commission will adopt to use in the interim to continue to cause improvement in the area of maintenance in the industry until such time as we felt we had generated a sufficient understanding of how to do it by rule, if that is what the Commission finally decides.

Senator BREAUX. The thing that disturbs me about that is we have had nuclear powerplants operating since when? When was the first one?

Mr. PARLER. 1957.

Senator BREAUX. In the late 1950s, so that is 30 years that we have had plants coming on line, and yet to find, in 1987, that we don't have maintenance requirements in some areas that are set out as to what should be done to keep these plants operational in a safe manner, that is supported by civil penalties.

If, in fact, they do not do that, and to find out one of the reasons is because we haven't had time to do it is very disturbing. I keep going back to the FAA example.

Every plane that gets a license from the FAA to fly has a manual containing maintenance requirements touching everything on that airplane from radios, from the engines being inspected at a regular time; from certain services required to be performed in a certain time. That manual was developed by the manufacturer, by the airline, and by the FAA. When they get it, it is in one package, and everybody agrees with it.

If the operator of that airline does not do any of those things that are required, they can have their license revoked or they can have civil penalties from a dollar to a quarter of a million and more levied on them, and that is the enforcement mechanism. Yet in this industry, which has been alive since 1957, we don't have that.

Mr. STELLO. Let me try to emphasize one point. With respect to safety, that is what this document deals with, safety systems; to be sure that those safety systems are capable of performing their intended function.

What we are talking about are areas where we feel we have not placed enough emphasis, balance of plant. That is a realization we have come to over the past several years with the accumulation of experience where too many challenges to the safety systems in the plant are coming from balance of plant.

I think all of us feel the need to do more in that area. But that is not to suggest that we have not been attendant to the safety systems that are needed to protect the health and safety of the public. Indeed, that is not the case, but clearly, we want to do more.

Now, why does it take so long? I tend to be impatient, too, but in reality, this industry is not very old physically. If you were to compare the regulation in the airline industry 30 years after the first airplane was flying, I think you would find that we are far more advanced in terms of regulating the nuclear industry relative to the airline industry, and it is recently that they have been making some of the changes in terms of how they regulate it and the way in which they are to embody these kinds of requirements.

Recall that in engine manufacture, when they develop a new engine, they have data to support particular overhaul schedules and maintenance schedules for the engine. They come to the FAA, and the FAA, through the airline industry, finally embodies those in their regulation.

And there are only, really, two engine manufacturers in the United States with a lot of engines that they have in service, so they accumulate data very quickly that they can come back, now, and adjust and redefine the maintenance and overhaul schedules for those engines and put them into a new set of regulations as they accumulate more data.

But in the nuclear industry, when you look at the complexity and the variation of equipment that is in there and literally, thousands of vendors supplying equipment, you don't really have the very convenient analog in which to do it.

Now I don't want to debate with you that we need to do more. We probably do.

Senator BREAUX. I appreciate the time factor.

Mr. STELLO. We just simply are where we are based on the best efforts that we have been able to get together thus far.

Senator BREAUX. I appreciate time factor that you are pointing out. It takes time, but by gosh, if we are going to be decommissioning some plants before we ever have in place a maintenance procedure for their operation, we are talking about decommissioning some plants within, what, 10 years?

Mr. STELLO. I guess the earliest one might be that soon.

Senator BREAUX. I am trying to put it in perspective. You are saving a lot of time. We are going to be closing down some plants before we have any enforceable civil penalties for maintaining them.

Mr. STELLO. That is true. But again, I must add, let us not conclude that there is no requirement to inspect and test and check and surveil equipment. The document that I keep referring to, I think you have to agree, is rather a comprehensive list of requirements.

We believe that that was the proper place to put this emphasis initially, and I stand by that judgment. I think it was right. We intentionally made the decision, 20 years ago when we started regulating in this business, that what we would have is the safety information so we would not have to concern ourself with the operation in the balance of plant equipment, and indeed, early experience suggested we were right.

But as we got more and more plants on surface and the plants became more and more complex as the larger plants came into service and we accumulated experience, those balance of plant problems became greater and greater and greater; it was never challenged. It was just increased so that we now, over the past several years, seek to do more in the area and have been.

Senator **Breaux**. If you had your preference, would you prefer that the maintenance procedures that we are talking about, the new ones, be a policy statement or that they be a rule?

Mr. **Stello**. At the moment, my preference would be to start with the policy statement, build up more information, issue an advanced notice of proposed rulemaking to get comment on how to frame a structure so that we are certain when we do that, we do it as best as we know how.

The reason for that is, I wouldn't want to lose the momentum that is on-going now in the industry in approving the maintenance program while we sort out and try to get prescriptive by rule, because that just takes a long time, and in the meantime, I would prefer to be guiding this through policy and continuing that momentum while we get the necessary information through the common process and study as to how to even frame regulations.

Senator **Breaux**. Do you agree with Admiral Zech that a policy, which is what I understood him to say, that a policy statement on this maintenance would not allow the institution of civil penalties for violation of those policy statement maintenance procedures?

Mr. **Stello**. Yes, I believe that is correct.

Senator **Breaux**. Mr. Parler, you were here for the discussions of Admiral Zech with regard to the proposed rulemaking on material misstatements. I tried to find out the rationale as to why documents, votes, and other material were apparently available after the proposed rulemaking, which, as I understand it, is not an ex parte proceeding, and those things are allowed, but a freedom of information request dealing with that same material is denied.

Were you involved in that, perhaps? Could you maybe elaborate on it for us?

Mr. **Parler**. I wasn't involved in that, Mr. Chairman. I did not assume my present responsibilities until the 1st of July of last year. The office that I am presently responsible for, however, is involved in providing advice to the Commission and the Commission's Secretary on appeals from Freedom of Information Act requests which are denied the first time around.

I certainly can state that if the office is aware that a document is available in the Public Document Room, that it would then be inappropriate to deny a Freedom of Information Act request.

I will certainly look into the matter whenever we go back, but in that regard, aside from the Freedom of Information Act focus, I would like to repeat something that I said in the summary: all of the factual underpinnings, the predicates for an informal rulemaking proceeding should be placed in the publicly available administrative record of the proceeding.

Senator **Breaux**. Is that the policy with regard to the SECY type of documents or staff memorandum documents leading up to a proposed rulemaking, that those would be put in the public document?

Mr. **Parler**. I would certainly think that the staff memorandum documents and the staff SECY documents would be placed in the administrative record. That is my understanding. However, I cannot assure you that in each case that is done.

Senator **Breaux**. Is there a policy? You are General Counsel. Has someone drafted something? It seems like someone would draft a policy that says, "Yes, they are" or "No, they are not." They are going to try to find out what the policy would be in regard to those type of documents.

Mr. **Parler**. Well, as I was about to point out, the policy, certainly for the last several years for matters such as this, has been for the document—certainly, the staff paper and the staff analytical documents—to be a part of the administrative record.

Senator **Breaux**. I think that is probably the question. Mr. Stello, we would like to have representatives from FAA present some testimony, and I am just wondering if you ever looked at their type of maintenance operation, whether you think that that is one that could be designed to be made workable for the Nuclear Regulatory Commission industry?

Mr. **Stello**. I am familiar with the area. I used to work on aircraft at a manufacturer, so I am fairly familiar with the portion of how FAA did it with the engines and how we in the airline industry justified, and if you remember, I think they probably don't even have them anymore.

The earlier engines had specific time between overhauls because we only had enough data to justify operating the engines over a particular period of hours and had various other activities that were prescribed in terms of overhauling and the hot section of the turbine and the high compresser stage and whatever.

As we accumulated more and more data, then we were able to go back to FAA and be able to justify that. Through the use of those data, variations and usually, extending it, which is obviously of interest to the airline industry, because it makes their life easier.

In fact, a lot of the engines today, we don't even have a title II overhaul specified.

Senator **Breaux**. Can that type of program be made adaptable to this industry?

Mr. **Stello**. For pieces of equipment, where you have centralized and you can get that kind of background and you can develop that in a generic sense, it would be very, very helpful if we could do that.

The difficulty is you have so many separate pieces of equipment that you would have to put together for the overall maintenance program, and quite frankly—and I am just going to give you a judgment—I think that when we are finished, we are probably going to have the equivalent of individual maintenance programs on a utility-by-utility basis.

Then it would be the same as the airline industry. United Airlines or one of the airlines basically comes and gets a program approved by the FAA. That general analog, I mean, if you apply it to the utility itself, I think in that context, it might be possible. But having a broad rule that would apply to all utilities for all plants and nuclear supply systems, I am not optimistic we can achieve it through that vehicle. But on a utility-by-utility basis, yes.

Senator **Breaux**. You have a maintenance program for all 727s; you have a maintenance program for 757s and 747s, and in each category, there is a separate maintenance program which is the same, regardless of which airline operates it.

Mr. **Stello**. I think, if you use that analog and say that each one is for a utility, their own, then I think that is achievable.

There is one other area you got into, and I hesitate to get back into it. I just thought the record was unclear when you were concerned over enforcement and when to open a violation or not, and if you like, I would give you some particular views that I have. I was involved in some of that. Maybe it might be helpful.

Our process is one in which, when we get facts, we issue a notice of violation, which basically says, "We have these facts and we think you have that violation." We propose a civil penalty at that time. We usually issue, and I think we do in all cases, a press announcement at that time. So that there is usually a considerable media interest in doing it, and we repeat it after we get responses back from the utility when we issue the final civil penalties.

So the utility has been subjected to considerable media pressure, and incidentally, that media pressure, very often, has far more benefit in causing correction in the utility than the civil penalty itself has. You cannot underestimate the value of just the public notice.

Now, on the issue of should you reopen it or not, well, you clearly have taken action where the reputation of the utility has been called into question. If new facts come to mind where that action was unjustified and somehow, fairness dictates you should do something about it, well, clearly, if you get significant new information that says something is really far more seriously wrong than you ever believed, then the staff proposal at that point would just be to institute an additional enforcement action against the utility. It may not even be a civil penalty; it may be an order.

But on the other hand, the judgment is, if it is just a change from a level III to IV or IV to III and it is not a very significant thing, then one has to ask, with the damage that has already been done, if you will, using damage to the utility's reputation and the impact that that has had, do we need to change it to add another $10,000 or $50,000 or $100,000 to a civil penalty? Or have we really already had the impact that we have desired? Is the correction adequate? Do we need to do more? It is really a judgment call.

I want to make one thing very clear. The staff would not hesitate to bring to the Commission an enforcement action where we learn the new information and it is suggested that something more was required. We wouldn't hesitate to do that, and I don't think the Commission would hesitate to support that action.

Senator **Breaux**. I would suggest that you sit down with whoever is drafting the proposed rule with regard to that very question, because I do not read it as allowing that to happen.

Mr. **Stello**. I recognize that.

Senator **Breaux**. Gentlemen, we thank you for being here. Thank you for responding to my questions.

Senator **Breaux**. I would like to welcome at this time Mr. Anthony Broderick, the Associate Administrator for Aviation Standards for the FAA.

Mr. Broderick, we have your statement. If you would like to summarize it, we would appreciate it.

STATEMENT OF ANTHONY J. BRODERICK, ASSOCIATE ADMINISTRATOR FOR AVIATION STANDARDS, FEDERAL AVIATION ADMINISTRATION

Mr. **Broderick**. Thank you, Mr. Chairman. I am Anthony J. Broderick, FAA's Associate Administrator for Aviation Standards. I am responsible for FAA's safety programs concerning our nation's airlines, including the development of safety regulations and the conduct of our surveillance and inspection programs for both operations and maintenance.

I am pleased to have the opportunity to appear before the Subcommittee to describe for you today our regulatory and compliance approach to the airline industry. We believe that these programs have worked well and have demonstrably assisted in fostering an outstanding safety record in the air transportation industry.

The FAA has regulations governing virtually all aspects of aviation safety. I would like today to narrow my discussion to the process we use in the initial safety certification of an airline which seeks to provide service to the public. I believe that process is illustrative of the kind of detailed and cautious measures we use in fulfilling our safety responsibilities in all areas.

Aviation safety is the responsibility of the FAA. The economic aspects of aviation were traditionally the responsibility of the Civil Aeronautics Board. With the sunset of the Board and deregulation, the remaining economic responsibilities were assumed by the Office of the Secretary of Transportation.

The National Transportation Safety Board is an independent agency with responsibility for investigating aircraft accidents, determining probable cause, and issuing safety recommendations to the FAA, among other agencies. This overall framework has proven highly effective in focusing the FAA's efforts on safety while at the same time providing us with an independent assessment of perceived problems in the system and recommendations for dealing with those issues.

The process used by the FAA to develop operations or maintenance regulations conforms to the Administrative Procedure Act. That process typically involves the issuance of a notice of proposed rulemaking, an NPRM, which is published in the Federal Register to offer an opportunity for public comment. We then shape a final rule following a full review of all comments received.

In some cases, we hold informal hearings to apprise the public of our rulemaking proposal and to seek additional comments. Also, in some instances, we issue what we call an advance notice of proposed rulemaking to solicit information on which to base a proposed rule that would then be issued in an NPRM.

Our rules are developed from a variety of sources. Many proposals emanate from internal FAA analyses. Some rules are developed following recommendations from the National Transportation Safety Board or are based on proposals received from airlines, manufacturers, professional associations or unions.

We also receive petitions for rulemaking from outside parties. Proposals may also emanate from FAA-industry seminars, conferences, or symposia on safety matters.

In short, there are a variety of ways in which regulatory concepts are formulated. We typically work closely with the aviation community in shaping an approach to dealing with an issue before proposing an NPRM. We are also vitally interested in having the benefit of their views concerning our proposals when they are published for public comment. As a policy matter, though, we discourage ex parte contacts during the course of a rulemaking. If such contacts occur, we place in the rulemaking docket a summary of the contact which occurred.

I believe we are genuinely fortunate in aviation that the community shares our common goal of enhancing aviation safety. In that regard, we generally find that the aviation community is as interested as we in developing and promulgating reasonable requirements that will advance safety.

As I noted earlier, our regulations govern the entire gamut of aviation safety activities. Although many are detailed and specific in nature, where feasible, we often describe rules in a "performance" oriented way, permitting regulated parties latitude in developing an approach that will satisfy the intended safety objective that we seek.

For example, rather than describing the particulars of how an aircraft must be designed or maintained, since this would stifle creativity and innovation, our aircraft certification and maintenance regulations typically prescribe objectives and standards which must be demonstrated by a particular design which we must be followed by a particular maintenance program.

The regulations which govern the state certification of maintenance requirements for new air carriers are found in Parts 121 and 135 of the Federal Aviation Regulations and in special Federal Aviation Regulation 38-2. Guidance on how to apply these regulations to applicants for certification is supplied to our field facilities through our airworthiness and flight operations orders or handbooks, which are developed in headquarters. The handbook guidance is further supported or elaborated through memoranda and frequent telephone conversations between headquarters and regional staff.

Since 1958, the process used by FAA to certify new air carriers has remained basically the same. An applicant for an air carrier operating certificate applies for certification through our flight standards field offices. Typically, informal meetings are held to inform the applicant of the requirements and procedures for certification and for the FAA to make initial assessments of the applicant's potential capabilities.

The action which more formally begins the process is a "pre application statement of intent" to start operations, which the applicant completes and provides to the FAA field office. This outlines, in general terms, the applicant's proposed scope and type of operations, type of equipment, areas of operations, airports to be used, et cetera.

The next step is for the carrier to flesh out the details of its proposed enterprise by submitting a formal application. Accompanying the formal application, or to be followed shortly thereafter, are the carrier's proposed general operations, maintenance and training manuals, along with check lists, approved airplane flight manuals, minimum equipment list, and other documents needed to evaluate its readiness to conduct air transportation in compliance with regulations and safe operating practices.

We evaluate such factors as whether the carrier has the capability to maintain aircraft in an airworthy condition; to properly train crew members, dispatchers and maintenance personnel; to safety turn around aircraft and crews from one flight to the next, and other pertinent parts of an air carrier operation.

We also require that resumes of key management officials be submitted with the formal application. As these paper reviews are being conducted, we move to the next phase of our examination of the carrier, that is, field inspections. FAA inspectors monitor the performance of such tasks as the training and checking of personnel and the inspection of proposed maintenance facilities. We examine the aircraft to be used to see if they meet certification and operational requirements.

As this process evolves, we look at the proposed management personnel to see if they have the knowledge and experience needed to operate an airline. We also look at the compliance history of the people who will be involved with the management of the company.

At some point, usually in the later stages of the process, the carrier applicant would be required to submit to the FAA a plan for "proving flights" which, as the name suggests, are flights in which the applicant proves to FAA's satisfaction that it has the capability to actually run an airline in compliance with the regulations and safety operating practices.

The carrier must prove to the FAA's satisfaction, through this process, that it can do so well. Thus, if the FAA discovers any deficiencies in the carrier applicant's procedures, that applicant will have to correct the problems and demonstrate that he has done so, even if this results in having to fly more hours of proving flights than called for in the plan.

Once the plan for proving flights is accepted, FAA begins more intensive surveillance of the applicant. An emergency evacuation demonstration is conducted, for example, which tests the emergency equipment, as well as the applicant's ability to maintain such equipment.

During ferry or training flights, the applicant's maintenance programs, procedures and capabilities are examined thoroughly. The carrier applicant would be required to fly into a number of the airports that are representative of those it proposes to serve.

During these flights, FAA inspectors examine the competence of the flight crews, flight dispatchers, flight attendants and ground personnel; the adequacy of maintenance programs and fueling procedures; and management's capabilities in the exercise of operational control.

We also pose hypothetical problems for the crews and the company's operational control systems to see how they would react in unusual situations, such as weather diversions and/or equipment failures.

After each proving flight, an FAA inspectors briefs the applicant's management on any deficiencies detected during the flight or during ground operations, and the applicant must take action to correct these deficiencies. If they are major, the applicant must demonstrate the effectiveness of the corrective action by conducting additional flights.

Once the FAA is satisfied that the carrier applicant's programs and systems adequately provide for compliance with the regulations and safety operating practices, the proving flights are terminated. Only after a successful demonstration by way of proving flights is an Air Carrier Operating Certificate granted to the carrier, along with operations specifications, which detail the conditions, including the maintenance programs, under which the carrier may operate.

Once a carrier has been certificated by the FAA, our involvement with the carrier doesn't stop. We exercise on-going oversight over the carrier to assure that it is in continuing compliance with both our safety regulations and its internal operations and maintenance manuals, procedures which have been developed pursuant to our regulations.

To do that, we employ a work force of aviation safety inspectors with expertise in aircraft operations, maintenance and avionics.

As a means of assuring that all operators are receiving appropriate levels of surveillance, we have established a comprehensive aviation inspection work program in headquarters requiring that our field inspectors conduct specified numbers of inspections, by type of inspections, of designated operators throughout the country.

We have also established a program of in-depth inspections using aviation safety inspectors from outside the normal geographical jurisdiction which overseas a given air carrier to inspect operators from top to bottom on a cyclical basis.

We recently established an evaluation staff at headquarters which enables us to better analyze data developed during our field inspections to determine if trends are developing and to more fully track changes which are occurring rapidly in the industry so that we can adopt our practices to conform to them as needed.

Further, we have been developing and implementing new and more comprehensive training and guidance materials for our inspectors to assist them in the performance of their surveillance efforts.

In addition, we have been engaged in an extensive program of recruiting and hiring additional safety inspectors to enable us to do a more effective job of surveillance. We believe strongly that these measures, along with a strong enforcement program, have contributed to an increased posture of safety compliance within the industry.

That concludes my prepared statement, Mr. Chairman, and at this time, I would be pleased to elaborate on it.

Senator **Breaux**. Thank you very much. With regard to the FAA maintenance program, are those maintenance standards and requirements done through rules and regulations, or is there any other way of getting those requirements out to the industry?

Mr. **Broderick**. We actually start with the manufacturer of the equipment and work with the manufacturer and other specialists in industry.

Senator **Breaux**. I understand that; the final product after that.

Mr. **Broderick**. The final product is, in fact, a regulatory product.

Senator **Breaux**. It is a rule?

Mr. **Broderick**. It is a rule.

Senator **Breaux**. You don't have any policy statements as to what the maintenance procedures should be in and go into detail as to what they should be?

Mr. **Broderick**. Well, we have a lot of policy statements, but those are over and above the detailed regulations which cover all of the maintenance.

Senator **Breaux**. So the procedures that the FAA requires of manufacturers and the operators of those airplanes are in rules and regulation form?

Mr. **Broderick**. That is correct, sir.

Senator **Breaux**. How are those rules and regulations the FAA promulgates enforced?

Mr. **Broderick**. Through our normal enforcement program, both civil penalties and certificate action. We can do everything from fine somebody a small or a large amount of money to take their operating certificate away.

Senator **Breaux**. Give us a range of some of the penalties, just as an example, of what the FAA has done when violations have been found. I would imagine in some instances, you have had very nominal civil penalties or even a letter all the way up to——

Mr. **Broderick**. All the way up to $9.5 million. That is the largest fine we have levied, although we have also put some companies out of business. In terms of actual cash fines, it has been $9.5 million.

Senator **Breaux**. And you have taken away licenses, decertified carriers?

Mr. **Broderick**. Yes, sir, and individuals, as well.

Senator **Breaux**. What is the minimum type of penalty, perhaps just a notification?

Mr. **Broderick**. It could be a letter of correction or warning notice or a $50 or $100 fine and go all the way up from there, depending on the circumstances.

Senator **Breaux**. In developing the regulations and the rules with regard to maintenance, who is involved in that process? Are the operators and the manufacturers as well as the FAA all involved in coming up with a single document?

Mr. **Broderick**. Yes, sir. At various stages in the process, we start with the manufacturer; we eventually involve operators and certainly, the FAA. The FAA must approve an airline's maintenance program.

We also require that each airline have a procedure that is approved by the FAA for modifying its maintenance program so that modifications which they propose and adopt to their maintenance programs are, in fact, developed by professionals.

Senator **Breaux**. How do you keep those procedures updated?

Mr. **Broderick**. Literally, they are required to notify FAA of any changes. Of course, the rules change from time-to-time as the industry changes.

Senator **Breaux**. Is there ever a situation that develops where the manufacturers and/or the operator would disagree with a proposed FAA requirement with regard to maintenance and safety, and if that ever occurs, how is that resolved?

Mr. **Broderick**. Unfortunately, once in awhile, that does occur, and we are pleased to listen to people who disagree with us. But we must make the final decision. We have the final authority and can issue a directive, depending on the situation, a directive to either the manufacturer to modify the design or to the operator to incorporate a change to its design or its maintenance program or both.

Senator **Breaux**. The final document as to how the maintenance should be handled on a particular plane or by a particular company; the final responsibility to prepare that document is the FAA's responsibility?

Mr. **Broderick**. The FAA approves the document. The FAA levees the responsibility on the airline for submitting a document which we can approve. They may not operate an airplane for which we do not have an approved maintenance program on record.

Senator **Breaux**. Some would argue, perhaps, that by putting maintenance regulations or the rule in a manual that is a required manual that it forces a type of checklist mentality that does not work in the best interests of health and safety.

Do you have any comments on that proposal?

Mr. **Broderick**. From the previous witnesses, I got the general impression that they were examining a process that is very similar to the one that we use. That is, we have a general requirement that an operator provide to the FAA an acceptable maintenance program covering the entire maintenance operation for an airplane that they operate. Before they operate it, we must approve that maintenance program.

That results in differences from operator-to-operator to suit their individual needs, and, of course, from airplane-type-to-airplane-type within even an operator.

So we allow, in fact, encourage operators to tailor a maintenance program to the specifics of their operation. Obviously, someone who is operating commonly in the tropics has a different kind of maintenance requirement than people operating out of Fairbanks, Alaska. That must be taken into account. I am sure it is the same with power companies.

Senator **Breaux**. I thank you for being with us. You have been very helpful in outlining a maintenance program and procedure that the FAA has that I am very impressed with.

I thank you for your help. It has been very, very helpful.

Mr. **Broderick**. I am pleased to be here, Mr. Chairman.

Senator **Breaux**. We are going to take a short break, 15 minutes. We have a vote going. I will be back and we will take our last panel as soon as we return. The committee will be in recess.

[Recess.]

Senator **Breaux**. The subcommittee will please come to order. We would like to welcome our final panel, consisting of Mr. William Conway, Group Vice President of Industry and Government Relations, Institute of Nuclear Power in Atlanta; Mr. Robert Campbell, Chairman, President and Chief Executive Officer for the Pennsylvania Power and Light Company; and Mr. Cordell Reed, Senior Vice President for Nuclear Operations for Commonwealth Edison Company.

Gentlemen, we are pleased to have you here. We are pleased to receive your testimony. I note that your testimony is very extensive. I would like to ask you to summarize it so we may get to questions.

STATEMENT OF ROBERT K. CAMPBELL, CHAIRMAN, PRESIDENT, AND CHIEF EXECUTIVE OFFICER, PENNSYLVANIA POWER & LIGHT CO., ALLENTOWN, PA

Mr. CAMPBELL. Thank you, Mr. Chairman. We will do that at your request. Our prepared testimony has been filed with the committee.

To summarize my remarks, I am Robert Campbell. I am, as you noted, the Chairman, President and Chief Executive Officer for Pennsylvania Power and Light Company, and I am pleased to appear today to present a perspective on the oversight of the nuclear power program in the United States and the necessary relationship between the industry and the NRC to support safe and efficient use of nuclear energy.

To ensure the continuance of nuclear power, the nuclear industry and the NRC share the common goal of safety. By law, the NRC is responsible for overseeing the safety of nuclear plants. To fulfill its role, the NRC establishes rules and regulations, policy and regulatory guides, inspects and monitors nuclear activities and takes enforcement action when the level of safety established by regulation is not met.

It is the utilities, however, who have hands-on responsibility for the management and safe operation of their facilities. Although the roles of the NRC and nuclear industry are significantly different, their common safety goal can best be achieved by working together in a cooperative and open relationship.

The nuclear industry recognizes that no matter how well-founded and successful the industry is, the NRC cannot forego its public and statutory responsibility. It is the industry's interest that the regulatory body and its processes are and are perceived to be effective and credible.

We in the industry are convinced that if nuclear power is to continue as a viable energy option, the nuclear industry and the NRC, as well as Congress and the general public, must continue to develop a regulatory environment with the following elements:

Industry self improvement initiatives; an effective and credible regulatory process; and an environment of public trust, confidence and cooperation between the industry and the NRC.

Improved operational performance will result if Congress lends its support to the commitment already made by the industry and the NRC. Thank you, Mr. Chairman. I will be very pleased, as we all would be, to respond to any questions you might have.

Senator BREAUX. Mr. Conway? Thank you.

STATEMENT OF WILLIAM F. CONWAY, GROUP VICE PRESIDENT, INDUSTRY AND GOVERNMENT RELATIONS, INSTITUTE OF NUCLEAR POWER OPERATIONS [INPO], ATLANTA, GA

Mr. CONWAY. Thank you, Mr. Chairman. I am William F. Conway, Group Vice President for Industry and Government Relations at the Institute of Nuclear Power Operations, or INPO. During my 34 years with the utility industry, I have been President and Chief Executive Officer for Vermont Yankee Nuclear Power Corporation.

I was a plant superintendent of that facility, and I have served in other capacities of nuclear operations management. I joined INPO 1½ years ago after having served on the INPO Board of Directors for three years. As you indicated earlier, a much more comprehensive discussion is included in my written testimony and its supporting material. That is attached to that testimony.

At the outset, I would like to stress that the public and the regulatory interests as well as the nuclear industry's interests with regard to operational safety are common. In our view, both have the same goal but both employ different methods in attaining that goal.

I won't speak to the services that are performed by the Institute at this point in time but, rather, will move quickly, at your behest, to highlight a couple of things that I think are of importance to us.

We have talked earlier today about policy statements. I think it is important that we note that it has been a very constructive and, I think, a very successful training policy statement that was envisioned and incorporated by the Nuclear Regulatory Commission and adhered to by the utilities over the past couple of years.

I think that issue stands on its own, hopefully, in my written submittal. I would like to briefly, though, touch on a maintenance initiative which has been recently begun by the Institute. The situation that the nuclear industry faced with regard to maintenance, we believe, is similar to that which was faced with the subject of training.

The diverse plant and equipment types require specifically designed maintenance practices. Thus, INPO and the industry's maintenance initiative is formed in a manner similar to the training and accreditation initiative, and at its heart is the development and self-assessment method used successfully during the evolution of the nuclear training program and accreditation process.

In early 1985, INPO analyzed maintenance-related plant events from the period 1980 to 1984. The results helped forge a targeted response to maintenance concerns. To help monitor maintenance progress, nine maintenance-related performance indicators have been tracked by the Institute and the industry since 1984.

"Guidelines for the Conduct of Maintenance at Nuclear Power Stations", which was an INPO-authored document, was distributed to the industry in the fall of 1985. These guidelines serve as the foundation for industry self-assessment efforts, and they address 16 key areas of maintenence performance. They range from the proper conduct of maintenance by craft personnel to the maintenance assessment activities of management.

The industry-wide initiatives that are discussed, more completely in my written testimony have played a very significant role in the progress shown in training, maintenance, as well as overall plant performance. As examples, I believe it is important to note that the industry-wide commitment to improving training quality since the late 1970s has produced, very significant changes in the indications of performance.

Unplanned automatic scrams in the industry decreased by more than 47 percent between 1980 and 1986. Our present data indicates that the decline is expected to continue in 1987.

Utility initiatives in worker safety, for example, have reduced lost-time accident rates at nuclear power plants by approximately 71 percent between 1980 and 1986.

I think very importantly in view of the testimony given earlier today by Mr. Stello, the number of safety system actuations per unit year is expected to have declined by more than 30 percent by the end of 1987, down to 0.9 per unit year from 1.3 per unit year in 1985.

I think you are aware that there has also been a significant drop in the levels of radiation exposure per unit and in the amount of radioactive waste generated per unit at the nuclear stations since 1980. These are examples that I have tried to stress—they are in my written testimony—that illustrate the parallel route of industry goals and regulatory objectives.

I would like to emphasize two factors that I believe are vital to INPO's success. These are our independent posture—while we are responsive to the needs and desires of all our members, we are completely independent from any one utility as well as that one utility's potential specific demands and, our ability to hold certain interactions with an individual member as private.

We believe these factors have had a positive effect on industry performance during the eighties, and preservation of these key ingredients, we believe, is necessary for INPO to continue to be effective.

The NRC, as well as INPO, share the ultimate goal of protecting the public health and safety. By being non-governmental, however, INPO can promote excellence, while government organizations, by their very nature, are constrained to focus on statutory requirements.

In our view, the drive to self-assess and improve from within is highly desirable. It leads to emulation and competition among utilities in the quest for excellence and, frankly, it is the American way.

It takes us beyond regulatory requirements in a very healthy and constructive manner. We believe it is working. Thank you for the opportunity to testify today, and we will welcome your questions later.

Senator BREAUX. Thank you. Mr. Reed?

STATEMENT OF CORDELL REED, SENIOR VICE PRESIDENT, NUCLEAR OPERATIONS, COMMONWEALTH EDISON CO., CHICAGO, IL

Mr. REED. Mr. Chairman, my name is Cordell Reed, and I am Senior Vice President of Nuclear Operations at Commonwealth Edison. The purpose of my testimony is to inform you of some of the checks and balances we have in the operation of our plants and my responsibility in that effort.

I will follow your instructions on summarizing my testimony. In terms of my background, I have a Bachelor of Science degree in Mechanical Engineering from the University of Illinois. I have been employed by Commmnwealth Edison since my graduation in 1960. I held various technical positions in our coal-fired plants, and in 1967, I was assigned to Edison's Dresden Nuclear Power Plant as a start-up engineer. I was licensed by the NRC, and I supervised operations for 3½ years.

Also, I also held various management and technical positions in our Nuclear Engineering Department, and for two years, I have headed all of our nuclear engineering activities. In 1979, I was appointed Vice President for Nuclear Operations, and in that responsibility, I have responsibility for the operation of five nuclear power stations.

I am currently Senior Vice President with responsibility for all of Edison's nuclear activities. Edison's nuclear operations now employs nearly 4,400 individuals. More than 900 of these employees are technical graduates, including Ph.D.s, computer engineers, radiochemists and metallurgists, amongst others. This is an extremely competent group of highly-skilled and dedicated people, and we are proud of them all.

Even though I think we have the utmost faith and trust in all of our highly competent engineers and managers, I still view nuclear operations as my personal responsibility.

That is why usually on the third Saturday of the month, you will find me visiting the station to observe the daily activities, including walking around the plant with the personnel, discussing our policies, observing their work and finding out what is going right and what is going wrong at the stations.

But besides the fact that it is my job, I have another reason for my commitment to ensuring that Commonwealth Edison's nuclear plants are safely operated. I was born and raised in Chicago. I live within 70 miles of several of our nuclear plants. My families and friends are all in Chicago, and my whole life is there. I have a real stake in my community, and I can assure you, I wouldn't tolerate unsafe operations at any of our plants.

I can also say with confidence that Commonwealth Edison has consistently maintained an overall commitment to the safety and reliability of our operations. A special commitment of our Commonwealth Edison Board of Directors is assigned the responsibility to oversight our operations. They include Admiral Eugene Wilkinson, who has a distinguished career in the nuclear navy and former President of INPO; Dr. Thomas Martin, Dean Emeritus of the Illinois Institute of Technology and Dr. Edward Mason, who is Vice President of Research at Amoco. All of these are technically competent individuals who review our operations, come to our plants and report back to our board of directors.

In addition to that, there are two other departments, a manager of nuclear safety and a manager of quality assurance, that reports directly to the chairman of our company and who both have the authority to order a plant shut down if they see an unsafe operation.

But in addition to the internal checks and balances, there are many external organizations that review our operations. Most prominent is that of the NRC. I definitely have seen a shift in the NRC's concern from engineering and construction to operation and maintenance.

During the construction of our LaSalle County Station, we have one NRC inspector present. During our construction of Braidwood Station, there are now three. There are now two resident inspectors at each of our nuclear operating stations. In my opinion, Commonwealth Edison and the nuclear industry are following separate but complementary paths with the NRC to assure excellence in our operation, also.

One more initiative is the Nuclear Utility Management and Resource Council. Here, utility executives got together in order to work on problems that were of concern to the NRC but were also problems that were hindering our excellence in our operations. We developed solutions, volunteered them to the NRC, in timely implementation, and in that way, we get to solve the problem in a more timely fashion.

In conclusion, I would just like also to say that the NRC provides great oversight over these programs and in their on-going inspection program. I think that the NRC and the nuclear industry are going down the same path; we have the same interests. That is, excellence in our operations, and although it may require a bit of finetuning, this mutual operation, I think, is leading us to excellence in our operations.

Thank you, and I am available for questions.

Senator **Breaux**. Thank you very much. Thank you, gentlemen, for your testimony.

Mr. Conway, with regard to INPO's operations, can you give us an outline of the various areas that INPO, perhaps, has made recommendations on, have reached a position on, on how certain matters with regard to health and safety should be handled?

For instance, do you have a manual on maintenance, a manual on employee training, a manual on the use of drugs or other substances in the work place?

Mr. **Conway**. Yes, sir. From the early days of the Institute, there has been continuing, on-going, and, as necessary, revised effort to develop criteria used by our evaluation teams or, in the process of our evaluation mechanism, to go out and visit plants on roughly an every 18-month basis for a 2-week period with a concentrated team of 15 to 20 people, some of them who are industry peers.

We found that to be a very successful program, but yes, we do use a developed set of criteria that is, I think, important to understand, designed to be above and beyond those kinds of things that are demanded by the regulatory process.

The concern stems from the Three Mile Island event when the industry concluded that there had to be things done differently, in a more superlative manner, recognizing that the regulatory process was probably well adhered to at TMI, however, the event occurred.

So there was a concern, and, a need, to express a means of doing business in a more elevated manner. We call them standards of excellence. We have the paperwork and criteria that describes how we accomplish that.

Senator **Breaux**. So when you check or inspect a particular plant, utility company, you check them against what standard? When you do a maintenance inspection, do you inspect them to see if certain things have been done? Where are all those certain requirements set out? Is it an INPO document?

Mr. **Conway**. Yes, it is.

Senator **Breaux**. It is in addition?

Mr. **Conway**. It is an INPO document that is utilized by our evaluation personnel, and it describes, very clearly, those kinds of things that we would anticipate to be occurring in the particular plant. It is not specific to one plant; it is a generic document.

Senator **Breaux**. It is a generic document?

Mr. **Conway**. Yes, sir, it is.

Senator **Breaux**. Hypothetically, if you inspect a plant for maintenance and you find a whole series of clear violations, what can and what do you do if that should occur?

Mr. **Conway**. We, at the end of an evaluation period, sit down with the manager of that particular facility and identify to him the kinds of conclusions that we have reached over this two-week process.

In the interim between that time and a date, perhaps, two or three weeks later, wherein we sit down with the Chief Executive Officer of a utility and describe to him the problems, as well as the good things that we found at that particular plant, a report is developed that identifies very clearly the kinds of deficiencies existing or improvements that should be accomplished by that particular facility.

We then very clearly sit with them and assist in developing responses to recommendations that we will make that say, "This should be improved; that should be improved."

We have found that doing it in that fashion and, in particular, sitting down and talking privately with the Chief Executive Officer and making him very knowledgeable and very keenly aware of what we had discovered, to be a good means of applying corrective action and is something that we have seen to be reasonably successful. We haven't changed our philosophy in doing that over the years.

Senator **Breaux**. You do not have, as I understand it, any enforcement mechanism to enforce those recommendations in the form of any civil penalties or of any other civil restrictions that INPO would have the authority to place on a utility, for instance, that just said, "We don't agree at all with what you are telling us. We are just not listening to what you have to say."

Mr. **Conway**. That factually is accurate. We do not have the ability to levy the kinds of instruments, that the regulatory process allows. However, I think one of the more important things that we are able to do is to bring a considerable amount of peer pressure, if necessary, to gain the interest of the people who may not be totally reactive to what we would suggest and what we would recommend.

I think equally as important is the subject of retrospective insurance. There is a nuclear insurance organization that is utilized by just about 100 percent of the utilities in the country, particularly the nuclear utilities. That particular organization does see the evaluation reports that INPO provides its members. And as a consequence of good or bad performance with respect to following the INPO criteria, there could be an adjustment in a particular premium associated with that coverage.

Mr. **Campbell**. I might just add, Mr. Chairman, that we also, at INPO, have the authority to remove a company from INPO membership, and with that, of course, would be the heavy potential consequences of loss of nuclear insurance.

Senator BREAUX. So the loss of nuclear insurance, if they get crossways with INPO, is a potential enforcement mechanism.

Mr. CAMPBELL. Correct.

Senator BREAUX. What actions are available to be taken by INPO with regard to the Peach Bottom situation.

Mr. CONWAY. I am sorry?

Senator BREAUX. What actions, if any, are to be taken with regard to the Peach Bottom situation?

Mr. CONWAY. The actions that we have been involved in since that occurrence have been more in the assist area. We have provided, I think, a considerable amount of assistance to them since that particular shutdown date, assistance in varying areas, not only within the management framework, but in specific areas that lead toward better plant operation, which is really what our mission is.

We have been of assistance to them. I personally have been there on two different occasions, for example, speaking to their operating personnel, demonstrating what INPO is, how INPO goes about doing its business, and what standards of excellence are really all about.

Senator BREAUX. What mechanisms to enforce INPO's training standards exist? It seems to me that the position of the NRC with regard to employee training is to tell a utility to follow the INPO manual on employee training, and here is a situation with Peach Bottom as an example that they have in place a training program that meets your standards.

Mr. CONWAY. That is correct.

Senator BREAUX. It is not being carried out, in fact. Something went wrong somewhere, because employees are not doing what their training manual obviously told them to do.

So we have a good training program, but it is not being carried out. The employees were not doing what the training manual obviously would have told them to do. That is after a policy statement from the NRC.

So here we have a plan in place that is not being followed. The NRC, apparently, has no real enforcement mechanism other than shutting down the plant. There really isn't any other than that, is there?

Mr. CONWAY. I think the enforcement people here this morning indicated the kinds of additional mechanisms they may have in place to utilize as something short of a shutdown. From many points—I think this is important, but many of the points can be derived from my written statement. In the process of accrediting these training programs, there is NRC scrutiny and involvement, through out that process.

For example, when a utility has prepared its training programs to reach the point where an accrediting board meets, sits, and passes judgment on those particular training programs, there is an individual on this five-man board who has been recommended to participate by the NRC. That has been in effect from the very beginning of the accreditation process.

Beyond that, we have had Nuclear Regulatory Commission personnel accompany INPO personnel as they travel around to the various utilities looking at the viability of their particular training programs. There has been, I think, a very encompassing audit, that has been performed by the NRC at the termination of the present 2-year policy statement on training that looks at what has occurred over the past 2 years from the regulators' viewpoint.

Senator BREAUX. I understand the point you are making, and that is that close cooperation between INPO and NRC is as it should be. Can you give me any argument as to why INPO's training program for employees should not be taken as a program has been developed with industry input and taken by the NRC and put into a rule or a procedure that, "This is what we want to be done and that if it is not done, we will have penalties for not doing it"?

Mr. CONWAY. I think quite honestly, one of the main reasons for that is the ability of the industry, once it makes a determination and once it settles on an initiative process, to come to closure, with the ability to formulate that particular kind of a program, and to put it in place in a much more rapid manner than the regulatory process permits.

Senator BREAUX. That is not my point. I am saying, get the program on paper. This is an industry problem. It is reviewed by the NRC to see that this program, in effect, meets the health and human safety requirements. Then take that package, whenever it is done, and say, "This will be our rules and regulations. If you do not follow it, you will be subject to civil penalties."

That is not the case now.

Mr. CONWAY. I understand.

Senator BREAUX. The question is: Can you make an argument as to why that shouldn't be? That is how I understand it works with the FAA. Industry develops a plan for maintenance and training their employees; FAA reviews it; they agree with it; and then it becomes a rule. If you don't do it, you are subject to a civil penalty.

In this industry, industry works with INPO, your organization, and develops a set of training procedures, but it never becomes a rule. It never becomes something that, if it is violated, there are civil penalties for violation.

My question to you is: What is wrong with that?

Mr. CONWAY. I don't suggest that there is anything wrong with it. I do suggest, though, that I think the history of that particular event that we are talking about, the particular subject matter we are talking about, leads one to believe that the industry, through its own initiative process, is able to police itself and do the job effectively without the need for that kind of regulatory action. I think it stands on its own.

Senator BREAUX. Let me finish this point, because I didn't catch it at all. You are saying that leads to what conclusion, that the industry cannot police itself?

Mr. CONWAY. No, no. I said I think the industry has very effectively policed itself, particularly in the area we are discussing now. I don't know that there is a need for a rule, because I think the industry has shown that the initiative process that has been undertaken in the training area, for example, has been highly successful without the need for a regulatory process.

Senator BREAUX. Obviously, Peach Bottom doesn't fall in that category.

Mr. Conway. I think it does. I think that the programs in place at Peach Bottom were the types of programs that met the criteria for more than adequate training.

I do think, however, that along with that, along with anything, there is a need for management to become involved, and I think perhaps if there was a breakdown somewhere along the line, I am not certain that it had anything to do with the training, but it may have had to do with how the force of management was with respect to training.

Mr. Campbell. Mr. Chairman, may I add just one additional thought on that?

Turning just a moment from the industry initiatives between INPO to having accredited training programs, I believe that the NRC's oversight of the industry, training and all other programs, is very effective and very pervasive. They have resident inspectors at all of our plants. Those resident inspectors are very, very much a part of everything that goes on in a plant.

They audit our procedures in detail; they audit how well we do our jobs; and they audit our training programs and how to conduct them. So that aside from the fact that INPO is a industry initiative and, in a sense, an industry consultant, this in no way changes the pervasive oversight control that the NRC has on our industry, which is effective.

Senator Breaux. I will agree with the oversight. There is oversight; there is mechanisms for inspections, et cetera. The concern I have is that when provisions of a policy statement are violated, the NRC has no mechanism to enforce those procedures other than revoking their license or shutting down the industry. To me, that is using a sledgehammer on something that may be subject to a civil penalty.

Policy statements do not get them there. Yet they are getting ready to publish a policy statement on maintenance. Their only admission is they have no mechanism through civil penalties to enforce that maintenance. They have a lovely, wonderful policy statement on maintenance and what should be done, which they say they need.

But when it comes to enforcing those simple things, in many cases, the only hammer they have is a sledgehammer: Close the plant, revoke the license. I am suggesting, like the FAA, that when a maintenance plan is developed through industry and NRC's joint efforts together, we should have a mechanism to enforce it short of closing down the plant.

Mr. Reed?

Mr. Reed. I just want to give a point of view from the utility. I served as chairman of the accrediting board for four years. There are three outside members on the board and two utility members on this board. When the NRC has approved the methodology for putting together training programs, they have participated in watching the performance of the utility meeting those criteria. The independent board then awards accreditation upon them, having proved to them that the utilities are meeting these standards.

But then the NRC, during their normal evaluation of our activities, rereview training; how well we are meeting the INPO standards. It is a separate functional area for review during our systematic assessment of licensee performance.

Indeed, if we get a low rating in that area, we have to show the NRC corrective action. If you get Category III ratings for a couple of years in a row, NRC would shut the plant down, but our threshold in interacting with the NRC is when they point out a deficiency, we don't say, "You don't have authority."

We correct that deficiency.

Senator **Breaux**. I agree with that. I can't think of anything in society whereby there is no penalty for a violation other than revoking the license, whether it was someone who is driving too fast on highways, the first time he gets a ticket. He pays a fine. He doesn't automatically lose his license.

From that simple example all the way up to the aviation industry, for the violation of something that needs to be done that is not a justifiable violation to shut down the airline, there is a fine. They can fine them as much as $900,000 all the way down to probably a couple of hundred dollars or less. But they have the authority to do something other than revoking the license.

In this industry, I find that there is nothing short from a penalty standpoint on these policy statement violations other than revoking the license. I don't think that is necessarily good policy.

Mr. **Reed**. Mr. Chairman, I think you will also note that at least in our industry, often, when a deficiency is pointed out, that we will voluntarily give compliance. Something you earlier said this morning in maintenance, whether the NRC has the ability to levy civil penalties on maintenance, indeed, they do.

In our Byron plant last year, we had installed a safety relief valve. We tested the valve on start-up and found it didn't perform properly. As we went into the problem, we found we had installed a part improperly.

We reported this to the NRC, which has mandated that we report things like this to the NRC. We had several meetings with them, and they felt we had a programmatic deficiency in our maintenance program. As a result, we received a $50,000 civil penalty for that.

Senator **Breaux**. I would imagine that those procedures that were violated were procedures that were required under your licensing agreement. They say they are coming out with a new policy statement on maintenance to cover a whole range of areas that are not covered under your licensing maintenance operations which will not be subject to any potential civil penalties.

Mr. **Reed**. But the distinction is that all of the equipment that are safety-related, that is, required to shut down the plant and to maintain the plant in a safe condition, is covered by the technical specification and by these requirements.

Senator **Breaux**. There is a whole lot of other areas.

Mr. **Reed**. We are talking about another class of equipment, now, that has to do more with reliability of the plant when we said balance of plant. If you lose the equipment, the plant can still be shut down safely. The NRC is now turning their attention to this area. It is more of the reliability of the plants and not to discharge their safety function.

That is why I think it is important to know that they have all of the authority that they need to regulate the safety of plants in the area of maintenance.

Senator **Breaux**. It gets into, somewhat, semantics. The maintenance required on plants when they get older and the parts are burning out, and those maintenance requirements on those facilities are even more important today than they were when that plant was first licensed.

Mr. **Reed**. I agree.

Senator **Breaux**. That is the area they are getting into now, and they are getting into it now without the potential for any civil penalties and violations of that. That is what we are given to change in, I think.

Mr. **Conway**. Mr. Chairman, if I might make a comment, I think one of the important things to bear in mind is that maintenance has a direct affiliation with the obvious operation of the plant. I think you will note in my written testimony that the number of automatic scrams, for example, which is a bellweather indicator of plant performance, has shown a sharp decrease over the last five to six years, which I think says something for the initiative process associated with maintenance.

Senator **Breaux**. I think your statements have been helpful. I think the discussion has been very informative. I appreciate very much your being with us and being patient in testifying. We thank you all. This panel will be excused.

[Whereupon, at 12:35 p.m., the Subcommittee recessed to reconvene at the call of the Chair.]

[Statements submitted for the record, responses to additional questions from the NRC, and responses from various individuals who were invited to comment follow:]

PREPARED TESTIMONY
SUBMITTED BY
UNITED STATES NUCLEAR REGULATORY COMMISSION

TO

SUBCOMMITTEE ON NUCLEAR REGULATION
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE

CONCERNING

USNRC'S POLICY ON REGULATORY INTERFACE WITH THE PUBLIC AND INDUSTRY, AND ITS PRACTICE OF ISSUING POLICY STATEMENTS

PRESENTED BY
LANDO W. ZECH, JR.
CHAIRMAN

SUBMITTED: OCTOBER 20, 1987

Thank you, Mr. Chairman. My fellow Commissioners and I are pleased to appear before you today to discuss the regulatory interface between the Nuclear Regulatory Commission and industry. Your letter of invitation raised a number of specific issues which you wish to discuss at today's hearing.

Before addressing these specific issues let me take a few minutes to summarize the relationship between NRC and the nuclear industry.

Interface with the Industry and The Public

The NRC's mission is to regulate those who commercially use or produce nuclear material so that the public health and safety, the common defense and security, and the environment are protected. In carrying out this regulatory responsibility the NRC is cognizant of the fact that the licensees have primary responsibility for the safe design, construction, operation, maintenance and management of nuclear facilities. Therefore, the NRC relationship with the nuclear industry should be one in which NRC encourages excellence in performance and quality workmanship, works with industry to improve safety, demands compliance with regulations, and moves promptly and vigorously with enforcement actions when warranted.

NRC's responsibilities as regulator require frequent communication with the regulated industry to ensure prompt and effective resolution of safety issues. At the same time, the regulatory process must provide an accessible avenue for the expression of public concerns and an adequate response to those concerns. It must not give preferential treatment--real or perceived--to any group or person. Such communication, which is generally open to the public, must be conducted in a business-like and professional manner.

The NRC's commitment to an open communication process was originally articulated in two policy statements in 1978. These policy statements formally stated the existing practice of permitting parties, potential parties, and the general public to attend meetings between the applicant and the agency staff, both prior to and after the docketing of a license application. Since 1978, additional guidance documents have been issued and implemented to ensure that NRC management and staff conduct themselves professionally and in accordance with our statutory mandate. A list of examples is attached to this statement.

In May and June of this year, I reiterated to all NRC employees the requirements for professionalism in the performance of NRC regulatory duties and for arms-length communication with those that are regulated. Copies of those announcements are also attached.

To further improve our performance, the Executive Director for Operations recently reviewed existing guidance and concluded that current guidance on relationships with the public and the nuclear industry is adequate in substance, but perhaps not in form. Therefore, an effort has been initiated to consolidate the existing and proposed guidance on relationships with the public and the licensees. I believe that our regulatory interface with the nuclear industry has been above board and our safety decisions have consistently been made available for public scrutiny. We intend to ensure our future activities are conducted in a like fashion.

The Use of Policy Statements

Your invitation asked that the Commission discuss the use of policy statements in lieu of rules, particularly in the areas of training, maintenance and fitness for duty.

Policy statements have been used by NRC to accomplish a wide range of objectives -- for example, to establish a safety goal and to encourage plant standardization as well as to encourage industry initiatives. To be effective a policy statement must provide adequate guidance on what is expected, be based on an industry or program effort acceptable to NRC, be aggressively monitored and evaluated by NRC, and detail an effective enforcement policy. With these elements a policy statement can be effective to implement sound regulatory objectives, can be implemented more quickly than a rule, and can conserve government resources. It may be particularly useful in dealing with issues, such as training and maintenance, where a variety of approaches attuned to local conditions could have equal validity.

The Administrative Procedure Act requires an agency to provide notice to the public by publishing its statements of general policy or interpretation of general applicability in the Federal Register. One of the recommendations of the Administrative Conference of the United States is that an agency should articulate its policies through published policy statements. The Administrative Conference further notes that a policy statement is an agency's indication of how it will exercise discretion. You asked that we specifically address the use of policy statements rather than rules in three specific areas: training, fitness for duty, and maintenance.

In deciding on a rule or a policy statement a central consideration is how can we best achieve the desired results? How is safety best served? Specific considerations are: is timeliness important, can effectiveness be achieved without a rule, is it a management or a technical hardware issue, does the expertise lie with the industry or with NRC?

The Commission issued a Policy Statement on Training Qualification of Nuclear Power Plant Personnel in March 1985. That policy statement detailed the elements of an acceptable performance-based training program, endorsed the INPO-managed training accreditation program, outlined a two-year monitoring/evaluation program, established an enforcement policy, and stated that the Commission would revisit the question of regulation after the two year evaluation period. Recently, the staff recommended that the Commission continue to endorse the accreditation program with a revised policy statement and to postpone rulemaking indefinitely.

The training policy statement has proved to be both an effective and resource efficient means to achieve a high level of performance-based training in the industry without relying on cumbersome prescriptive regulation. The policy statement is effective because it endorses an active industry-managed training accreditation program, which encompasses the elements that NRC would have included in a rule. The industry effort is resource intensive to a level beyond our means, so that we can apply our limited resources to monitoring and sampling rather than to conducting strict compliance reviews at over 100 reactors. The policy statement has been successful in that needed improvements were made in a timely manner.

We believe that the Commission's decision to issue a Policy Statement on the Fitness for Duty of Nuclear Power Plant Personnel in August 1986 was appropriate. In early 1983, the nuclear utilities established the Nuclear Utility Management and Resources Committee (NUMARC) as an organization dedicated to the resolution of important safety issues on an industry-wide basis, including the assurance of appropriate corrective action by every utility. As one of the early programs addressed by NUMARC, the Commission felt that it was appropriate to recognize the industry fitness for duty program and to defer our own rulemaking as a signal of our willingness to accept responsible self-improvement initiatives which are consistent with improved safety. Our policy statement accepted the basic fitness for duty standards which each utility could establish in varying local environments with their employees and union representatives, their numerous contractors, and legal jurisdictions.

The Fitness for Duty Policy Statement, by its own terms, is to be reevaluated next spring after an eighteen month trial period. At that time the Commission will determine whether a rule is the appropriate way to proceed based on our experience under the policy statement. In the interim, the Commission is not lacking in its ability to address any condition that has the potential to compromise safety. The NRC has the unquestionable authority to issue orders directing appropriate corrective actions when necessary. If plant safety is potentially affected because a person is unfit for duty, the Commission authority to order remedial action to correct the potentially unsafe condition is not diminished simply because the subject matter is covered by a policy statement rather than a rule.

Maintenance is one area where some licensees perform better than others but where virtually every licensee could improve. The Commission believes that proper preventive and predictive maintenance programs with due regard for balance of plant systems have the potential to identify and correct precursors to safety problems before they become safety problems. The ability to predict and prevent failures will become even more important as the plants in service today age. Particular attention must be paid to maintenance practices in balance of plant systems and components and to management commitment to total systems attention.

Our reviews indicate that the industry, through individual plant efforts and the initiatives being implemented by INPO and other organizations, has made and is continuing to make further progress. Industry self-improvement initiatives appear to be effective in encouraging industry pursuit of excellence. Under the circumstances, a policy statement could accomplish a number of objectives expeditiously. It would (1) articulate the high level of importance NRC places on maintenance, (2) specify a well-defined period for industry initiatives to be completed, (3) identify the means for continued NRC assessment, and (4) state that if the initiatives fail to be effective, the NRC will proceed with rulemaking.

In April of this year, the Commission approved the staff's proposal to proceed with development of a Commission Policy Statement on Maintenance. More recently, the Commission agreed that the staff should proceed with an Advance Notice of Proposed Rulemaking and studies necessary to develop a proposed maintenance rule when the maintenance policy statement is issued. The schedule would be such that the proposed rule will be ready for Commission consideration about the time that the period of evaluation of industry progress outlined in the maintenance policy statement expires.

With respect to its enforcement ramifications, a policy statement in and of itself provides guidance only and does not have the force and effect of law as does a rule. A person cannot be cited solely on that basis for not complying with a policy statement. But as I have already stated, whether or not a regulatory policy is set forth in a policy statement or in a rule, there is no effect at all on our authority to order corrective action. A policy statement may also give an indication of the circumstances under which the Commission might find it necessary to issue orders addressing safety issues.

Because a policy statement is not adopted in accordance with the rulemaking procedures of the Administrative Procedure Act, it does not constitute or change regulatory requirements. Therefore, nothing in a policy statement limits the authority of the NRC to issue orders, call enforcement meetings, suspend licenses, or take other enforcement action when regulatory requirements are not met or a safety problem is found.

Rule vs. Policy Statement

There are no set guidelines for determining whether a rule or a policy statement is more appropriate for dealing with a particular issue. The practical approach depends upon the circumstances of the individual case. A rule is more time-consuming to put into place than a policy statement. To some extent a rule may require more resources for development and to ensure compliance through monitoring and inspection. With a policy statement, the Commission can monitor the progress toward certain goals while letting the licensee use a variety of approaches to achieve those goals. With the variety of utilities, plant designs, and regional characteristics in the United States, some flexibility in permitting licensees to develop varying approaches is frequently appropriate.

In dealing with backfits, the Commission already had a rule on the books, 10 CFR 50.109, issued by the Atomic Energy Commission in March 1970. A 1981 study by the NRC staff, as well as a great deal of other evidence, suggested that the rule wasn't working as it should and, to quote the staff report, "not withstanding the competence and good intentions of the staff,

... the pace and nature of regulatory actions have created a potential safety problem of unknown dimensions."

In late 1981, the Commission established the Committee to Review Generic Requirements (CRGR), which was directed to review all proposals by the staff for new generic requirements imposed on power reactors. Three years later, the NRC proposed a revised backfit rule for public comment that embodied and codified much of what the CRGR was already doing and that provided the general principles by which the staff was to manage plant-specific backfits not reviewed by CRGR. This revised backfit rule became effective on October 21, 1985.

Since the Commission had decided upon a specific system for the management of backfits, and since a rulemaking would have been required in any event to amend the existing rule, the Commission opted for revision of the rule rather than adoption of a policy statement.

With respect to material false statements, the specific problem addressed by the Commission was the lack of any regulatory requirement that could be used for the submittal of inaccurate information other than the material false statement violation. The material false statement label carried connotations of lying or serious negligence. Even though in some instances, the submittals to the agency may have been considered to be careless rather than intentionally false, the proposed rule was considered necessary to provide a regulatory basis for enforcement purposes for all of these circumstances.

The Commission imposed a new rule specifying fire protection requirements on February 19, 1981. This action was taken to upgrade fire protection at plants licensed to operate prior to January 1, 1979 by requiring resolution of certain contested generic issues in fire protection safety evaluation reports. The new rule (Appendix R to 10 CFR Part 50) also imposed certain fire protection upgrades to all nuclear power plants regardless of license date. The staff's intent was to apply the provisions of this new rule only for the resolution of unresolved disputed fire protection features. At that time, 17 such issues existed for 32 plants.

In its contemplation of the final rule, the Commission weighed the safety benefits of requiring compliance for operating plants which had already been judged by the staff as having adequate fire protection (i.e. plants with no unresolved disputed features). The staff and Commission agreed that three areas warranted improvements in all plants. Those areas were ensuring that systems and circuits associated with safe shutdown of the reactor plant remain free of fire damage, providing emergency lighting for at least an 8-hour period, and providing a system for collection of lubricating oil for reactor coolant pumps. In summary, the Commission issued a rule when efforts to reach agreement with certain utilities failed regarding features intended to reduce fire risk.

Enforcement Actions

Finally, you asked that our testimony explain how appropriate enforcement actions are decided upon and undertaken once a violation of a Commission regulation is discovered. 10 CFR Part 2 of NRC's regulations sets forth the procedures the NRC uses in exercising its enforcement authority. This regulation provides that the appropriate NRC Office Director initiates the civil penalty process by issuing a notice of violation and proposed imposition of a civil penalty. After evaluation of the licensee's response, the Director may mitigate, remit, or impose the civil penalty. An opportunity for a hearing is provided if a civil penalty is imposed.

Similar provisions govern the issuance of an order to show cause why a license should not be modified, suspended, or revoked or why some other action should not be taken. Although an opportunity for a hearing is provided an affected licensee, the NRC is authorized to make orders immediately effective if the public health, safety or interest so requires or, in the case of an order to show cause, if the alleged violation is willful.

Regulatory requirements have varying degrees of safety, safeguards or environmental significance. Therefore, the relative importance of each violation must be identified. Consequently, violations are categorized in terms of five levels of severity to show their relative importance within each of eight activity areas. An explanation of the enforcement policy and procedures of the NRC and its staff in initiating enforcement actions is set forth in Appendix C to Part 2. With your permission, I would like to submit that Appendix for the record.

Mr. Chairman, that concludes my prepared statement. My fellow Commissioners and I would be pleased to respond to any questions the Subcommittee may have.

PREPARED TESTIMONY
SUBMITTED BY
UNITED STATES NUCLEAR REGULATORY COMMISSION

TO

SUBCOMMITTEE ON NUCLEAR REGULATION
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE

CONCERNING
USNRC'S POLICY ON REGULATORY INTERFACE
WITH THE PUBLIC AND INDUSTRY, AND ITS
PRACTICE OF ISSUING POLICY STATEMENTS

PRESENTED BY
VICTOR STELLO, JR.
EXECUTIVE DIRECTOR FOR OPERATIONS

SUBMITTED: OCTOBER 20, 1987

Mr. Chairman, I am pleased to be here today to discuss, as you have requested, certain aspects of NRC's program.

The broad purpose of this hearing I understand is to address the NRC interface with industry. In that regard I believe NRC uses the highest standards of professionalism and integrity in conducting our business with industry. It is essential that we work closely with the owners, operators and designers of plants we regulate, there is no way around it. It is equally essential that we exercise independent judgement over those we regulate and that we not become captured by them. We are conscientious of both needs and I have no hesitation in stating that we maintain full independence. If the balance is uneven, it is on the side of too adversarial a relationship, rather than one that is too cozy.

You have asked me, generally, to address the issues of policy statements versus regulations. As a general matter the staff and I prefer to regulate by means of rule, rather than thru policy statements. Rules are more direct and precise, make clear what is required of the licensee and provide a basis for a full range of sanctions in the event of violations. On the other hand, there is a place for policy statements when we are attempting to challenge industry to seek higher levels of excellence than might be justified by "adequate protection of the public health and safety", which is the standard we set for rules. Policy statements do not set definitive standards, but state what the Commission desires the industry to achieve. Given that intent, they require initial coordination with industry to assure that industry has the capability, the will and a proper sense of direction and dedication to a quality effort. Public comment is, as in rule development, also normally acquired.

The process undertaken in determining whether to promulgate a regulation rather than a policy statement on a particular subject is one of considering whether existing binding and enforceable NRC requirements (regulations, license conditions, or orders) are sufficient to regulate in the particular area. If so, then a policy statement would suffice to explain a Commission position. If not, then appropriate regulations may be necessary and these would be promulgated to codify legally binding and enforceable requirements.

Other factors that can lead the agency to decide to issue regulations are that civil penalties would then be available for violations, as well as referral to the Department of Justice for willful violations of such regulations.

While the rulemaking process can be a lengthy one, it is designed to assure a full development of the issues and a fair consideration of opposing views. In general we believe the rulemaking process does serve those functions and its success may even be enhanced if preceded by use of policy statements.

Industry work based on a policy statement is of course, subject to careful oversight and evaluation by NRC. We may at any time choose to institute a rule if we are not satisfied with industry progress under the policy statement. While the Statements themselves do not establish specific requirements which are subject to enforcement, if threatened, we have full authority to act if plant safety is at issue, and we have done this a number of times. With that preamble, I will move directly to the more specific issues you have asked me to address.

POLICY STATEMENTS

Fitness for Duty

This policy statement, issued in August 1986, deals principally with licensee programs dealing with use of alcohol and drugs in licensee facilities. On this issue, NRC staff initially (1984) proposed a rule. The industry, thru its agent NUMARC/INPO, proposed to the Commission that the industry be allowed to address the issue within guidelines set by the Commission with the goal of achieving a level of excellence beyond that which the Commission might achieve by rule. The Commission choose to allow NUMARC to accept this challenge, partly because it was felt that they had the ability to address the issue better with the flexibility of a policy statement, given the limited staff expertise available in NRC, and partly because the Commission believed that industry must accept the greater responsibility for improving their own operations. Given the general nature of the proposed rule in 1984 and the emerging national debate over human rights, legal and constitutional issues on drug testing, I believe that the Commission correctly chose to recognize and encourage the industry's initiative in self-management by accepting a program which, except for the matter of enforceability by NRC, was more detailed and comprehensive than the rule proposed by the staff. During this process, the Commission was in control, not the industry. The final Policy Statement accepting the industry program, including the Commission's expectations on testing and disciplinary measures, was written by the Commission itself and those provisions were agreed to by NUMARC. The NRC has been carefully watching the industry in this effort to evaluate how the Policy Statement has worked. Shortly, the Commission will review industry progress and will determine whether to continue with the Policy Statement or move forward with implementation of a rule.

Training

For similar reasons, a policy statement on Training was issued in March 1985. As a result of industry work, an accreditation system was established by industry which met and exceeded NRC staff expectations. The Commission endorsed the program in 1987 with a revised policy statement. The NRC staff continues to monitor the program carefully, and unless industry falters, does not foresee the need for a definitive rule. For example, INPO recently and voluntarily added the task of operator requalification to the accreditation program. The excellence of this industry training initiative exceeds what NRC would likely have established as a rule and allows NRC to assign its technical resources to uses which have greater utility in the maintenance of safety standards.

Maintenance

I would like to be quite clear on this point: the industry needs to make considerable advance in their maintenance programs - especially in "balance of plant" components. For some time staff has been addressing ways in which to do this, "balance of plant" being given increased emphasis because, although it is largely non-safety related, faults in that area frequently challenge safety systems. The basic principles of a policy statement on maintenance were discussed at an August 15, 1986, meeting with NUMARC. At that time, NUMARC did not agree with the need for a policy statement. Subsequently, in a November 20, 1986 meeting with the Commission, industry representatives indicated that a policy statement would be conducive to encouraging and strengthening the industry initiatives and improvements. On July 8, 1987, the staff met with representatives of INPO to discuss the development of a policy statement. The intent of the meeting was to obtain information regarding the status of the industry initiatives so the policy statement could provide an accurate representation of them. We do not intend to provide a copy of the policy statement to the industry prior to its release to the public. The policy statement has been developed in its entirety by the NRC staff and upon Commission approval, it will be issued for public comment.

Other Potential Policy Statements

Technical Specifications which govern the operation of commercial nuclear power plants are under review by NRC with the purpose of relocating to other programs, specifications of lesser importance and small safety significance which have accumulated over the years. Using lessons from operating experience, the specifications will be streamlined and improved technically and their tasks will be made more understandable for both the plant operators and the NRC. Staff thinking at this time is that this issue may be most amenable to further development via a Policy Statement. That is, industry could undertake this fairly large and important effort if properly guided and overseen by NRC, whereas if undertaken by NRC as a regulation the process would require resources better allocated to other safety matters. The staff expects to forward a proposal to the Commission in the very near future.

Staff has also for some time been dealing with the issue of integrating into individual plant schedules, the variety of plant modifications required of licensees both by NRC and by their individual plant needs. By prioritizing all such work more effectively, we seek to achieve a better system at each plant for implementing changes in a manner most amenable to achievement of safety at each plant. Our work is continuing in this area and a Commission decision to proceed with a policy statement has recently been made.

Enforcement and Industry Involvement

In regards to enforcement, we have no concern with our ability to maintain safety at nuclear power plants thru the use of Policy Statements. Clearly we can not enforce requirements which do not exist. On the other hand any safety concern can be dealt with by our general authority over all plants. We have ordered plants to be shut down for dereliction of duty reasons (sleeping on duty) and for reasons of inadequate maintenance programs and they have not been allowed to restart until we are satisfied public health and safety is adequately protected. Further, we can always move to a definitive rule if industry progress is not adequate, or incorporate staff and industry work on an issue into a rule once it matures if it appears appropriate to do so.

Industry involvement is obviously necessary in any significant step NRC takes in regard to safety. We meet with industry groups to determine their views and initiatives and as appropriate, solicit technical data for our needs. In development of a policy statement our involvement with industry differs from development of a rule primarily in that the goal is to extract an appropriate commitment and encourage self-help initiatives, as opposed to determining the kind of detailed technical understanding from each and every licensee that a rule would require. Clearly that involvement must be above board and carried out with propriety and professionalism in mind. We must be satisfied with the thrust and detail of their effort in response to a policy statement, and its implementation at plants. We must redirect it to our satisfaction or move to a rule when we are not satisfied or perhaps when industry efforts have reached a point where we feel consolidation of this work into a rule is justified.

REGULATIONS

Clearly not all NRC efforts to establish proper safety standards throughout the regulated industry are appropriate to Policy Statements. The vast majority are incorporated in rules. Rules are utilized when we know what we want to accomplish and how to accomplish it and are not willing to allow too much flexibility in achieving a result. The general process for development of a rule is codified in the Administrative Procedures Act, 5 U.S.C. 553.

You have also asked how several rules were developed and that information is outlined below.

Material False Statement Rule

As you are aware, in March of this year, the Commission published its proposed rule on Completeness and Accuracy of Information, a proposed rule that includes the issue of material false statements. A final rule is currently before the Commission for its approval.

The process used for development of this and other Commission rules is mandated by the Administrative Procedure Act, 5 U.S.C. 553, which requires publication in the Federal Register of the proposed rule, a public comment period, and consideration of comments received, before the final rule is promulgated. Thus, the statutory procedure for rulemaking provides for industry and public participation at the proposed rule stage. Such participation assists in a sharpening of the issues and assures a fuller consideration of opposing views. In response to the March, 1987 Federal Register Notice, the Commission received comments from 23 organizations and individuals, including utilities, law firms, citizens' organizations, a medical physicist, a commerical testing laboratory, and members of the public. The staff has proposed one change in the rule as a result of comments received.

In the case of this particular rule, the Commisison also solicited public comments at the earliest stages of its deliberative process, in 1984, when the Commission was deciding whether to consider changes to its policy on material false statements. Moreover, the Commission in 1984 formally established the Advisory Committee for Review of the Enforcement Policy, a small committee of individuals selected from outside the agency, to conduct an in-depth study of the NRC's enforcement program, and to solicit further comments from interested persons.

Fire Protection Rule

The Commission imposed a new rule specifying fire protection requirements on February 19, 1981. This action was taken to upgrade fire protection at plants licensed to operate prior to January 1, 1979 by requiring resolution of certain contested generic issues in fire protection safety evaluation reports. The new rule (Appendix R to 10 CFR Part 50) also imposed certain fire protection upgrades to all nuclear power plants regardless of license date. The staff's intent was to apply the provisions of this new rule only for the resolution of unresolved disputed fire protection features. At that time, 17 such issues existed for 32 plants. In its contemplation of the final rule, the Commission weighed the safety benefits of requiring compliance for operating plants which had already been judged by the staff as having adequate fire protection (i.e. plants with no unresolved disputed features). Following further input from the staff Commission directed that three areas warranted improvements in all plants. Those areas were ensuring that systems and circuits associated with safe shutdown of the reactor plant remain free of fire damage, providing emergency lighting for at least an 8-hour period and providing a system for collection of lubricating oil for reactor coolant pumps. In summary, the staff proposed rulemaking when efforts to reach agreement with certain utilities failed regarding features intended to reduce fire risk.

Backfit Rule

As you know, Chairman Zech recently testified on the backfitting of nuclear power plants before the House Subcommittee on General Oversight and Investigations to the Committee on Interior and Insular Affairs at its hearing on October 14. In this testimony the Chairman discussed the development of the backfit rule and the impact of the recent Court decision vacating the rule.

The first backfit rule, 10 CFR 50.109, was issued by our predecessor, the AEC, in March 1970. The backfitting, or modification, of a license or facility as new information became available was recognized as a necessary aspect of reactor regulation. As reactor designs evolved, regulatory guidelines and criteria also evolved. Following the TMI-2 accident, a large number of design and operating requirements were imposed by the NRC on the entire industry. These requirements demanded added licensee resources and tended to redirect licensee resources from necessary ongoing routine safety-related tasks. Following a 1981 survey at 12 major utilities to determine the overall safety impact of imposing this large number of requirements over a relatively short period, it became clear that a potential safety problem had been created and that the control of the issuance of new NRC requirements was inadequate. The 1970 backfit rule was not having the intended effect of imposing a disciplined approach to the backfitting process. By November 1981 in recognition of this need, the Commission had established the Committee to Review Generic Requirements to review all proposals by the staff for new generic requirements and to provide recommendations to the EDO on their disposition.

By late 1984, the NRC proposed a revised backfit rule for public comment that embodied and codified much of the disciplined evaluations the CRGR was already doing, and that provided the general principles by which the staff was to manage plant-specific backfits that were not being reviewed by CRGR. Adoption of the backfit rule in September 1985 reaffirmed in a highly visible, disciplined, and mandatory way the Commission's commitment to improved control of backfitting. The use of a rule rather than a policy statement was judged to be the appropriate regulatory vehicle since a rule was already in place and the experience gained from the interim backfit management procedures which had been used for several years would allow issuance of direct and precise requirements regarding actions to be taken by the staff.

Industry Involvement

NRC/Industry involvement in development of rules is governed, as I have noted, by the Administrative Procedures Act. We follow the direction of that act carefully in our development of rules. While it requires a rather lengthy process to achieve a final rule, we have no reason to be either dissatisfied with it, or believe that we are not fully in compliance with its structures.

CLOSING

I trust that my comments on these issues have been helpful in explaining to the Subcommittee how we do business on these matters. We are mindful of our responsibilities and we wish to meet them with professionalism and integrity. I am now available for such questions as you may wish to address to me.

PREPARED TESTIMONY
SUBMITTED BY
UNITED STATES NUCLEAR REGULATORY COMMISSION

TO

SUBCOMMITTEE ON NUCLEAR REGULATION
SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE

CONCERNING
NRC/INDUSTRY REGULATORY INTERFACE

PRESENTED BY
WILLIAM C. PARLER
GENERAL COUNSEL

SUBMITTED: OCTOBER 20, 1987

Mr. Chairman, Members of the Subcommittee, I am pleased to appear before you today to discuss, as requested in your October 13, 1987 letter, the application of the Commission's ex parte rules to formal and informal rulemaking proceedings and the enforcement implications of using policy statements rather than regulatory requirements.

In the past, in accordance with the discretion afforded by section 189a of the Atomic Energy Act and the Administrative Procedure Act, the NRC has used informal "notice and comment" rulemaking procedures almost exclusively. Because such rulemakings involve policy revisions of general applicability, under section 553 of the Administrative Procedure Act and the NRC's implementing regulations in Subpart H of Part 2 of Title 10 of the Code of Federal Regulations, no ex parte restrictions have been applied to these informal rulemakings. The agency, however, is subject to the requirement that its informal rulemaking efforts must be supported by a public record that contains the factual basis for the agency's action. To this end, our legal position is and has been that substantive communications to the agency relating to the factual predicate for a proposed rule should be part of the public record concerning the rule.

The Commission has not convened a formal-type rulemaking proceeding in recent years. If a decision were made to convene a formal "on the record" rulemaking proceeding today, I would recommend that, with respect to communications between decisionmakers and persons outside the agency, the Commission impose restrictions regarding ex parte communications like those now contained in the existing Commission regulations. As I indicated in testimony before this Subcommittee on May 14, 1987, the Commission's existing ex parte rule requires that decisionmakers are not to request or entertain any private evidence, explanation, analysis, or advice regarding any substantive matter at issue in a formal proceeding, the decision in which must be rendered on the basis of the evidentiary record.

In this regard, should the occasion arise in the future, I would recommend the limited use of formal "on the record" procedures in a rulemaking proceeding to resolve only those factual issues that relate to scientific or engineering matters central to the proposed agency action and that are the subject of a significant, unresolved dispute among recognized technical experts. Such procedures would not, however, be legally required.

With respect to policy statements, which the Administrative Procedure Act exempts from even its minimal notice and comment requirements for informal rulemakings, the agency does not impose any ex parte restrictions. However, the basis for a policy statement, which would reflect at least indirectly any comments received during its formulation, is publicly set forth in the Federal Register.

On the subject of the enforcement implications of the use of policy statements, such statements do not themselves establish binding norms which have the force of law. Therefore, they cannot independently be the basis for an enforcement action. They do serve, however, as a strong expression of a Commission preference for certain licensee conduct and, as such, could exert a positive regulatory effect upon licensees.

In any event, the use of a policy statement in no way limits NRC's authority or responsibility to conduct necessary inspections relative to the subject matter of the policy statement. Nor does the use of a policy statement to address a concern preclude the Commission from taking prompt and significant corrective action to protect the public health and safety. Such authority, which is derived from the agency's statutory charter in the Atomic Energy Act of 1954, as amended, is not dependent on whether a subject matter is covered by a regulation or by a policy statement. Corrective actions could include the issuance of an order or the imposition of a license condition that could require other remedial action or the issuance of an order suspending or revocating a license. Moreover, in the event an order or license condition is issued requiring remedial action a subsequent violation of that order or license condition could be the basis for enforcement action, including civil penalties, or suspension or revocation of a license.

CHAIRMAN

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

February 24, 1988

The Honorable John Breaux, Chairman
Subcommittee on Nuclear Regulation
Committee on Environment and Public Works
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I am enclosing answers to the following questions contained in your January 27, 1988 letter: questions 1 through 13, 23, 28, 30, 33, 34, 36, 38, 39, 40, 48, 61, 74, 77, 78, 79, 80, and 81.

As discussed with Mr. Tim Smith of your staff, the remaining answers will be forwarded during the next several days.

Sincerely,

Lando Zech

Lando W. Zech, Jr.

Enclosure: As stated

cc: Sen. Alan Simpson

QUESTION 1. As a result of the Brown's Ferry fire in 1975, the NRC issued fire protection guidelines [Branch Technical Position (BTP) 9.5-1] for nuclear power plants and asked licensees to compare fire protection features of their facilities to the new guidelines. Between 1977 and 1980, the NRC staff received reports from all licensees identifying areas in their plants that did not conform to BTP 9.5-1. Commission documents show that by 1980 most fire protection guidelines had been met by most licensees; but several items remained outstanding and some licensees would not implement the items voluntarily.

(A) Specifically, which items in the guidelines were the staff and utilities unable to agree on?

ANSWER.

A list of the unresolved issues is given below. The specific technical requirements associated with each of these issues can be found in the correspondingly numbered section of Appendix A to Branch Technical Position APCSB 9.5-1 or Appendix R to 10 CFR 50.

1. Water Supplies for Fire Suppression Systems
2. Sectional Isolation Valves
3. Hydrant Isolation Valves
4. Manual Fire Suppression
5. Hydrostatic Hose Tests

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QUESTION 1 (continued) - 2 -

6. Automatic Fire Detection
7. Fire Protection for Safe Shutdown Capability
8. Fire Brigade
9. Fire Brigade Training
10. Emergency Lighting
11. Administrative Controls
12. Alternative and Dedicated Shutdown Capability
13. Fire Barrier Cable Penetration Seal Qualification
14. Fire Doors
15. Oil Collection System for Reactor Coolant Pumps

QUESTION 1 (continued) - 3 -

(B) Which utilities refused to implement the above items voluntarily?

ANSWER.

Initially, the staff sought to resolve these issues through meetings between the NRC and utility management. After one such meeting, representatives of Northeast Utilities refused to implement certain fire protection features. To the best of the staffs' recollection, this was the only instance where utility representatives presented the staff with an outright refusal. Other utilities, such as Florida Power and Light and Carolina Power and Light, offered alternatives to certain guidelines.

1/27/88 BREAUX Q1

(C) Generally, what was the utilities' rationale for not implementing the disputed fire protection items?

ANSWER.

In general, the utilities indicated that they believed that alternate fire protection features could be implemented that would achieve a level of safety comparable to that attained by literal conformance with the staff guidelines. This reasoning was based, in part, on the fire loss experience of the nuclear industry (including the Browns Ferry fire), on the utilities' procedures for control of combustible materials and fire hazards, and on plant-specific fire protection design features. In addition, the utilities indicated that conformance would be impossible to achieve in some instances because of plant-specific design features; in other instances, they indicated that compliance could be achieved only at a cost that the utilities considered excessive.

(D) Did the staff agree with the utilities reasons for not implementing BTP 9.5-1 in its entirety? Please explain fully.

ANSWER.

During the course of plant-specific evaluations of the utilities' fire protection programs, the staff fire protection engineers did agree that certain deviations from the staff's guidelines were justified. The specific deviations and the staff's rationale for approving them can be found in the collective body of safety evaluation reports. However, with regard to the outstanding issues listed in the response to Question 1A, the staff had not reached agreement with some utilities by the time the decision was made to develop a fire protection rule that encompassed these issues.

The guidelines in the Branch Technical Position were developed by fire protection engineers and other safety professionals in response to recommendations related to the investigations following the Browns Ferry fire; these included improvements recommended by a Special Review Group established by the Commission following the fire. Consequently, the staff believed that the guidelines represented a reasonable and technically sound approach to providing needed fire protection improvements at nuclear power plants.

(E) Did the fire protection engineers within NRC agree with the utilities positions?

ANSWER.

As described in the response to Question 1D, staff fire protection engineers had reached agreement with utility representatives that certain deviations from the fire protection guidelines were justified, but they had not reached agreement with some utilities concerning those issues that formed the basis of Appendix R to 10 CFR 50.

QUESTION 2. In 1980, the Commission issued a fire protection rule (Appendix R to 10 CFR 50) to resolve the fire protection issues. Why did the Commission issue this rule when most utilities had implemented BTP 9.5-1?

ANSWER.

As explained in Volume 45, No. 225 of the Federal Register, dated November 19, 1980, the staff originally intended the requirements of Appendix R to be applicable, on a selective basis, to those utilities that had not yet reached agreement with the staff concerning the implementation of Appendix A to BTP APCSB 9.5-1. Subsequently, the Commission decided that Sections G, J, and O of Appendix R were to be applied retroactively to all utilities. This decision was made as a result of "the increased knowledge and experience developed on fire protection" since the initial fire protection program reviews were conducted by the staff. It was intended to ensure that there was a consistent and acceptable approach toward fire protection for these three relatively important areas.

QUESTION 3. In 1982, the Nuclear Utilities Fire Protection Group (NUFPG) challenged NRC's new fire protection rule in Connecticut Light and Power, et al. v. NRC, 673 F.2d 525 (D.C. Cir. 1982).

(A) Specifically, what utilities did the NUFPG represent in its court action?

ANSWER.

NUFPG represented the following utilities:

The Connecticut Light and Power Company
The Hartford Electric Light Company
Western Massachusetts Electric Company
Northeast Nuclear Energy Company
Northeast Utilities Service Company
Boston Edison Company
Arkansas Power and Light Company
Florida Power and Light Company
Baltimore Gas and Electric Company
Carolina Power and Light Company (Intervenor)

1/27/88 BREAUX Q3

(B) What were the bases for the NUFPG challenge?

ANSWER.

The petitioners contended that the notice of proposed rulemaking for the fire protection rule gave no indication of the technical basis of the proposed rule, that the 30-day period the Commission allowed for comments on the proposed rule was too short given the complexity and innovative character of the proposed rule, that the rule the Commission ultimately adopted differed in major respects from the proposed rule, that the Commission failed to offer an adequate technical justification for the final rule, and that the Commission failed to comply with the then-existing version of the backfit rule, 10 CFR 50 § 109. A copy of the Court's decision is attached to our response to Question 3(C).

QUESTION 3. (continued) - 3 -

(C) For what reasons was the NRC's fire protection rule upheld?

ANSWER.

The Court upheld the fire protection rule because, in the Court's opinion, "the administrative record contain[ed] adequate support for the Commission's determination that adoption of the rule[] was urgently needed to protect the public safety." See the attached copy of the Court's decision, 673 F.2d at 528. However, the Court also said that the Commission's conduct of the rulemaking had given the industry "the minimum acceptable opportunity to respond", id. at 537, and that had the Commission provided any less reasoned explanation for the rule, the Court would have been compelled to remand the rule. Id. at 528. The Court was particularly troubled by what it viewed as inadequate justification for certain limitations the rule imposed on the fire protection methods licensees could adopt. Id. at 534-36. Ultimately, the rule's provision for justified exemptions from those limitations was crucial to the court's willingness to uphold the rule. Id. at 536, 537 (rule as tempered by exemption procedure must be upheld).

Attachment:

Connecticut Power & Light, et al. v. NRC, 673 F.2d 525 (1982).*

*Retained in committee files.

QUESTION 4. In 1983, the staff issued Generic Letter 83-33 (GL 83-33) to all licensees and applicants of nuclear power reactors.

(A) In general, what is the purpose of NRC's generic letters?

ANSWER.

Generic Letters are used when NRC wants to communicate an NRC position to more than one licensee or solicit information from a number of licensees. For example, a Generic Letter could communicate a new Commission policy that may require no response or action on the part of the licensee or the Generic Letter could ask the licensees to provide a certain type of information, such as the schedule for licensee requalification exams or their evaluation of a particular safety issue. Also, a Generic Letter could provide to licensees the conclusions reached by the staff or staff analysis of information previously requested from them.

(B) Why did the NRC issue GL 83-33?

ANSWER.

As explained in the Generic Letter (dated October 19, 1983), the staff determined that some utilities were interpreting certain requirements of Appendix R in a way that was not consistent with the positions that the staff was using. This conclusion was based on the staff's evaluations of a number of exemption requests, as well as on some plant audits. Consequently, the staff decided that, because of the utilities' confusion regarding Appendix R, it was necessary to issue the supplementary guidance to facilitate their efforts to analyze their plants for conformance with Section III.G of Appendix R.

(C) Specifically, what areas did GL 83-33 encompass?

ANSWER.

The Generic Letter encompassed the following issues:

1. The extent of automatic fire detection and suppression systems
2. The delineation of fire areas
3. The protection of structural steel
4. The definition of a fixed suppression system
5. The combustibility of electric cable insulation
6. Assessing the hazard of "transient" combustible materials

Each of these issues is explained in detail in the Generic Letter, a copy of which is attached.

Attachment:
Generic Letter 83-33

QUESTION 4(C) Attachment

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

October 19, 1983

TO ALL LICENSEES AND APPLICANTS OF NUCLEAR POWER REACTORS

Gentlemen:

SUBJECT: NRC POSITIONS ON CERTAIN REQUIREMENTS OF APPENDIX R TO 10 CFR 50 (GENERIC LETTER 83-33)

During our evaluations of exemption requests, we determined that some licensees were interpreting certain requirements of Appendix R in a manner that was not consistent with the position that the staff was using. Where any such differences were discovered, we informed these licensees in the NRC Safety Evaluation Report supporting the granting or denial of an exemption. More recently, we have completed inspections for conformance to Appendix R at four plants, the licensees for which had indicated that all modifications for conformance had been completed or other modifications approved by exemptions had been completed. In these inspections, the NRC inspection team also identified what the staff considers to be non-conformance with requirements of Appendix R, for which exemptions had not been requested or justified.

Therefore, we are transmitting the enclosure to all licensees and applicants for information and use as appropriate. The NRC inspection teams that will be conducting the inspections for conformance to Appendix R at each plant will be using these positions as their criteria for conformance for these particular issues. No written response to this letter is required.

Sincerely,

for

Darrell G. Eisenhut, Director
Division of Licensing
Office of Nuclear Reactor Regulation

Enclosure:
As stated

NRC Staff Positions on Certain
Requirements of Appendix R to 10 CFR 50

Introduction

During our reviews of Appendix R exemption requests and our review of applications for operating licenses, it has become apparent that certain requirements of Appendix R to 10 CFR 50 and the corresponding guidelines in SRP 9.5-1 were not being interpreted correctly by some licensees. On several occasions members of the staff met with representatives of the Nuclear Utility Fire Protection Group (NUFPG), other industry representatives, and individual licensees to disucss clarification of certain requirements. The staff agreed to send the staff positions on these issues to all licensees.

1. Detection And Automatic Suppression

Staff Position: Subsections III.G.2.b, III.G.2.c, and III.G.2.e require that fire detectors and an automatic fire suppression system be installed "in" any fire area. To satisfy this requirement, the fire detectors and automatic suppression system need to be installed "throughout" the fire area.

Some licensees have not interpreted "in" the fire area to require full detection and suppression "throughout" the fire area. This interpretation makes the requirement ambiguous.

In some fire areas, however, the installation of a fire detection and a fire suppression system throughout the fire area may not significantly increase the level of fire safety afforded by only partial coverage; or the installation of a fire suppression system throughout the area may be detrimental to overall plant safety. Such areas must be evaluated under the exemption process, along with a fire hazards analysis that shows the installation of fire detection and/or suppression systems in only select locations within the fire area will provide an equivalent level of protection.

2. Fire Areas

Staff Position: Section III.G of Appendix R sets forth the requirement for fire protection for safe shutdown capability on the basis of fire areas.

A fire area is defined as that portion of a building or plant that is separated from other areas by boundary fire barriers (walls, floors and ceilings with any openings or penetrations protected with seals or closures having a fire resistance rating equal to that required of the barrier). Open stairwells and hatchways in ceilings and floors are not fire area boundaries.

For boundary fire barriers, using walls, floors, ceilings, dampers, doors, etc. existing prior to Appendix R, the rating required of a boundary fire barrier is based on the guidance in Appendix A to BTP ASB 9.5-1, i.e., the rating of the barrier or boundary must exceed with margin the fire loading in the area and need not necessarily be a 3-hour rated boundary unless the fire loading warrants such a boundary. For modifications which involve the installation of new boundary fire barriers pursuant to Section III.G.2.a, the fire rating of such boundaries must be three hours, or an exemption must be justified and requested.

The evaluations by some licensees made prior to Appendix R were based on fire zones which do not meet the strict definition of fire areas clarified above. In some cases, the separation of redundant trains under consideration within the "fire zone boundaries" and the separation between fire zones does not comply with the separation, i.e., barrier or distance, requirements of Appendix R. Such configureations need to be evaluated under the exemption process.

The fire protection requirements are intended to provide reasonable assurance that at least one safe shutdown division is free of fire damage after a postulated fire in any fire area. The definition of "fire areas," noted above, is predicated on sound fire protection engineering principles as they apply to limiting the fire and fire suppressant damage to redundant shutdown equipment and cables. Fire areas defined by non-physical boundaries, such as "logical divisions" or "equipment groupings", may not necessarily restrict fire and smoke spread, and do not necessarily provide reasonable assurance that the limits of fire or fire suppressant damage to shutdown systems have been defined.

In many plant areas, however, the erection of physical barriers between redundant shutdown systems is precluded by the location of cable trays, HVAC ducts and other plant features. In such situations, the staff has accepted, in concept, the use of an automatic fire suppression system which discharges a "water curtain" across the boundary areas separating the redundant systems. The design of such "water curtains" has not been codified, i.e., the National Fire Protection Association Standards do not address the use of fire suppression systems for such applications. However, the staff is currently working with several applicants and licensees to define design requirements which will satisfy mutual concerns. The staff's present position is that such systems should feature close-spaced, open-head sprinklers with water discharge initiated by tripping a deluge valve activated by cross-zoned smoke detectors. Where smoke propagation does not represent a hazard to redundant shutdown systems, a close-space, close-head sprinkler system may be deemed acceptable. Where such "water curtains" are used, the operation of such systems should not endanger safety systems on either side of the "water curtains."

3. Structural Steel Related To Fire Barriers

Staff Position: Appendix R requires that structural steel forming a part of, or supporting a fire barrier separating redundant trains shall be protected so as to have a fire rating equivalent to the fire resistance required of the barrier.

The protection of structural steel is required because steel loses strength when subjected to temperatures that may be attained in a fire. 1100 degrees Fahrenheit is normally considered to be the critical temperature. At this temperature the yield stress in steel has decreased to about 60 percent of the value at room temperature. This is approximately the level normally used as the design working stress. Because steel has a high thermal conductivity, and heat is transferred away from a localized heat source rather quickly, a relatively long period of time is required to reach the critical temperature. However, an exposure fire that distributes heat over a greater area may reduce this time considerably. Structural steel need only be rated to the level of the barrier of which it is a part, based on the combustible loading in the area. If protection is required to achieve such a rating, then the steel would have to be protected. In cases where the structural steel is not protected and has a lower fire rating than the required rating of the fire barrier, an exemption must be requested and justified by a fire hazards analysis which shows the temperature the steel will reach during fire, and the ability of the steel to carry the required loads at that temperature.

4. Fixed Suppression System

Staff Position: A fixed fire suppression system shall have discharge heads and the distribution piping for such heads installed. Hose stations do not satisfy this requirements.

The majority of areas for which a fixed fire suppression system is required contain large concentrations of cables and, therefore, have high fire loadings. In addition, access for fire fighting may be hampered by congestion and smoke. A fixed fire suppression system should be capable of controlling a fire in such areas even under limited access conditions.

5. Intervening Combustibles

Staff Position: Section III.G.2.b requires the "separation . . . with no intervening combustibles . . ." To meet this requirement, plastic jackets and insulation of grouped electrical cables, including those which are coated, should be considered as intervening combustibles.

Numerous comprehensive flammability tests conducted by the Electric Power Research Institute (EPRI NP-1200, EPRI EL-1263), Factory Mutual (Contract RP-1165-1), and Sandia National Laboratories (NUREG/CR-2431, among others) have shown that burning plastic cable insulation represents a significant fire hazard. These tests were conducted on both IEEE-383 qualified and unqualified cable. While the qualified cable exhibited a tendency to ignite and propagate flame less rapidly, combustion of grouped cables continued at significant levels. In particular, grouped vertical cables which are not protected by a fire propagation retardant, such as metal tray covers or fire retardant coatings, can result in rapidly developing fires with high heat release rates.

6. Transient Fire Hazards

Staff Position: When addressing transient combustibles in exemption requests, the fire hazards analysis should consider the conservative bounding value for a transient fire hazard that could reasonably be expected over the life of the plant.

Over the past few several years, several attempts have been made by the NRC and industry to develop criteria for establishing "design basis transient combustibles." These have been suggested:

1. The maximum amounts permitted by the plant's administrative controls or some multiple of that amount.

2. Selected amounts (e.g., 1 pint, 1 quart, or 1-20 gallons) of a combustible liquid (e.g., acetone, heptane, lube oil, or solvents).

However, none of these criteria have stood up to critical evaluation as to why they are bounding conditions in all possible circumstances. During the life of the plant, transient combustible materials may be located in, or pass through safety related areas. These hazards arise from activities associated with operation, maintenance, repairs or modifications. They may arrive deliberately under approved work permits or inadvertently as a temporary expedient. Usually, a fire involving such materials would not overpower the fire protection features provided in accordance with Section III.G and, therefore, are only of concern when exemptions or deviations are requested.

In reviewing "transient combustibles" when evaluating exemption requests, the staff considers, among other things: (1) the physical attributes of the area that will tend to limit the amounts of transient combustibles, e.g., restricted access due to the environment within the area and location of the area or physical access limitations; (2) whether the fire area is required by the plant Technical Specifications to be manned continuously; (3) the physical attributes of the fire area and configuration of the systems of concern which apply to their capability to limit fire and fire suppressant damage; and (4) the safety significance of the systems of concern.

QUESTION 4. (continued) - 4 -

(D) Did GL 83-33 change the staff's interpretation of previous fire protection guidelines or rules in any way? Please explain fully.

ANSWER.

Not all language of the Generic Letter had been in previously published staff guidance. However, the technical positions expressed in the letter were intended to be consistent with existing staff interpretations of published guidance.

The implementing section of the Fire Protection Rule, 10 CFR 50.48, permitted licensees to implement the requirements of Appendix R without prior NRC approval. NRC approval was necessary only if a licensee requested an exemption from the rule. When the staff began inspecting the plants of licensees who had reported they were in compliance with Appendix R, the staff determined that some licensees were making interpretations that were not consistent with those of the staff. The staff had established interpretations of the published guidelines to aid its fire protection engineers in the review of licensees' exemption requests. When it became apparent that some licensees' interpretations of Appendix R were different from those of the staff, it was decided to issue Generic Letter 83-33, which was intended to delineate the staff's interpretations.

QUESTION 5: In 1984, despite existing guidance on fire protection (BTP 9.5-1, Appendix R, GL 83-33, and others), the NRC staff provided the Commission new proposed guidance after meetings with the Nuclear Utilities Fire Protection Group (NUFPG). Among other things, the proposed guidance explicitly reversed the staff's position requiring licensees to seek exemptions if they deviate from Appendix R requirements.

(A) On March 8, 1984, the NUFPG met separately with the Executive Director for Operations and the Deputy Executive Director for Regional Operations and Generic Requirements. Who requested the meetings and for what purpose?

ANSWER:

The NUFPG requested a meeting with Deputy Executive Director for Regional Operations and Generic Requirements (DEDROGR) to discuss Appendix R interpretation issues and other technical questions raised by licensees at an industry-sponsored Fire Protection Seminar on February 14-15, 1984. The ultimate objective was to expedite implementation of Appendix R requirements.

We have no record or knowledge of a meeting between Mr. Dircks (then EDO, now retired) on March 8, as indicated by the question.

QUESTION 5. (continued) - 2 -

(B) Who attended the meetings for NUFPG and NRC?

ANSWER:

Mr. Stello's calendar (then DEDROGR) indicates the following visitors attended the March 8, 1984 Fire Protection meeting:

From NUFPG:

Al Cutter and Wade Larson, Carolina Power and Light
Bill Counsil, then with Northeast Utilities
Mike McGarry and Malcolm Phillips (NUFPG Counsel)

Jim Conran, DEDROGR staff, also attended this meeting.

QUESTION 5. (continued) - 3 -

(C) Were NRC fire protection engineers attendees at either of the two meetings? If not, why not?

ANSWER:

Fire protection engineers were not at the DEDROGR meeting held in the afternoon of March 8. NUFPG representatives wanted to discuss with NRC senior management their concerns over delays in the implementation of Appendix R resulting from confusion among their licensee membership regarding differences in Appendix R interpretations, the prospect of hundreds of additional exemption requests in completing the implementation of that rule under existing interpretations and guidance, and some NUFPG suggestions for addressing these mutual problems. After NRC management decided the best course of action from that point for completing the implementation of Appendix R, fire protection engineers were heavily involved in the process of developing the new fire protection guidance and interpretations approved by the Commission for issuance with Generic Letter 86-10.

(D) What decisions were made as a result of those meetings and what was the rationale (both technical and legal) for the decisions?

ANSWER:

No final decisions were made on any specific fire protection issues as a result of the NUFPG meeting with DEDROGR. The discussions that day were instrumental in determining an agency course of action aimed at expediting the completion of Appendix R implementation, which ultimately involved the development of a Commission-approved package of new fire protection guidance and Appendix R interpretations announced to licensees in early 1986 by Generic Letter 86-10.

QUESTION 6. Attached to the new guidance on fire protection given to the Commissioners was an "Interpretations" document.

(A) What was the purpose of the "Interpretations" document?

ANSWER.

The purpose of the "Interpretations" document was to provide dispositive guidance on acceptable methods of satisfying NRC regulatory requirements. It was also intended to supersede prior guidance, such as that in Generic Letter 83-33 regarding fire barriers and the extent of the fire protection system. The net effect of this guidance was expected to reduce the number of exemption requests submitted by licensees in implementing Appendix R and to expedite the modifications needed for conformance and closure on Appendix R.

QUESTION 6. (continued) - 2 -

(B) What role did the NUPFG have in drafting the "Interpretations"? Did it provide language or subject matter for the document?

ANSWER.

Representatives of NUPFG had requested that the NRC provide new interpretations in certain areas. They also gave the staff a draft version of the "Interpretations" document for consideration (refer to the attached chronology and list of documents). The draft was reviewed by the NRC staff and management.

Attachment

QUESTION 6(B) Attachment

FIRE PROTECTION ISSUE CHRONOLOGY

3/22/75	Major fire occurs at Browns Ferry Nuclear Plant affecting a number of normal operating and safety systems.
2/21/76	NRC Special Review Group on Browns Ferry Fire issues report on incident (NUREG-0050). More than 50 recommendations for improvement of fire protection at nuclear power plants are made by the Review Group.
5/1/76	NRC staff issues new fire protection guidelines for nuclear power plants based on NUREG-0050 recommendations. Licensees are requested to compare fire protection features of their facilities to these guidelines. [A complete listing of post-Browns Ferry fire protection guidance developed/issued by the NRC staff is provided in an attachment to this chronology.]
Early-1977	All licensees provide a Fire Protection Program Evaluation for their facilities identifying areas that do not conform to new NRC guidelines. NRC staff initiates effort to achieve full implementation of new guidelines by October 1980.
Early-1980	Most new fire protection guidelines have been implemented by most licensees; but several items remain outstanding and some licensees will not implement these remaining items voluntarily.
5/29/80	Commission issues proposed rule (IOCFR50.48 and Appendix R) to resolve remaining fire protection issues in operating reactors.
11/19/80	Commission issues final fire protection rule for operating reactors. This new rule backfits its new requirements for protection of safe shutdown capability to all operating reactors, even those for which the NRC staff has already accepted alternative fire protection features in the fire protection reviews under the new post-Browns Ferry guidelines.

1/29/82	New fire protection rule is challenged in U.S. Court of Appeals by licensees belonging to Nuclear Utilities Fire Protection Group (NUFPG). Licensees contend that NRC did not indicate or explain the technical bases for new rule in noticing proposed fire protection rule revisions.
3/16/82	Court of Appeals upholds NRC on new fire protection rule, because rule includes explicitly a provision for licensees to request exemption from any aspect of the new rule upon showing that modifications required under the new rule would not enhance fire protection safety or that such modifications may be detrimental to overall facility safety.
7/5/83	NRC staff reports to Commission (in SECY-83-269) that, as of the end of May 1983, licensees have requested 588 exemptions from Appendix R requirements.
10/19/83	NRC staff issues Generic Letter 83-33 informing licensees that staff evaluations of exemption requests, and initial inspections at several facilities for compliance with Appendix R requirements, indicate serious problems with licensees' interpretation and implementation of Appendix R requirements.
11/15/83	General meeting in Bethesda, Md. of cognizant NRC program and regional office personnel responsible for fire protection implementation to discuss serious, widespread confusion among licensees regarding Appendix R interpretation. Decision is made to issue Information Notice and hold workshops in each region to address these problems.
12/19/83	Order imposing $50,000 fine for violations of Appendix R requirements at Trojan Plant is signed by Director of Inspection and Enforcement, NRC. Licensee's response to citations indicates that confusion regarding interpretation of Appendix R requirements is a major factor in the development of this situation. This action by NRC focuses strongly the utilities' concerns regarding the need for clarifications by NRC regarding Appendix R interpretations.
2/13/84	Information Notice 84-09 is issued by NRC staff informing licensees of non-compliance problems noted in initial Appendix R inspections, providing supplemental guidance regarding acceptable interpretations of Appendix R requirements,and advising of upcoming regional Appendix R workshops.

2/14-15/84 General meeting sponsored by NUFPG for all operating reactor utilities to discuss Appendix R interpretation difficulties, and to identify specific Appendix R issues and common areas of confusion among licensees that require clarification by NRC.

3/2/84 NUFPG submits formally to NRC staff "Questions Raised During The Nuclear Utility Fire Protection Seminar", for discussion with NRC staff at a meeting on 3/8/84.

3/6/84 NUFPG submits formally to NRC staff "Issues Which Are Not Clearly Addressed In The Fire Protection Rule", for discussion with the NRC staff at a meeting on 3/8/84.

3/8/84 NUFPG meets during the morning with cognizant NRC program office management, and during the afternoon with the Deputy Executive Director for Operations and members of his staff, to discuss Appendix R questions and interpretation issues raised in the 3/2/84 and 3/6/84 NUFPG submittals.

3/22/84 NRC staff provides to Commission for information a comprehensive new package of proposed guidance to assist operating reactor licensees in interpreting and implementing the requirements of Appendix R. The new guidance package addresses directly the questions and problems that have arisen in connection with Appendix R fire protection reviews and inspections to date (in particular, the extensive set of questions and issues identified and submitted by operating reactor utilities through NUFPG). The new guidance package is also distributed to all affected operating reactor licensees.

3/23/84 First of five NRC regional Appendix R workshops is held in Region III (Chicago, Ill. area) to discuss new Appendix R guidance package. Similar workshops were held subsequently in each NRC region as follows:

Region V	(San Fransisco area)	4/5/84
Region I	(Philadelphia area)	4/18/84
Region IV	(Dallas area)	4/26/84
Region II	(Atlanta area)	5/4/84

(Notice of these meetings was sent by the NRC Regional Offices to all affected licensees/applicants, to cognizant state government officials and Local Public Document Rooms, and to a number of public interest groups, intervenors, and other interested members of the public, well in advance of the workshops, in accordance with standard NRC document distribution service lists.)

5/2/84	Differing Professional Opinion submitted (co-signed) by five NRC program office and regional inspection staff, objecting to use of new Appendix R interpretations included in the new guidance package. The concern is expressed that the new interpretations will not permit timely or consistent resolutions of Appendix R deviations.
5/29/84	A member of the Office of General Counsel (OGC) staff expresses legal concerns regarding the new Appendix R interpretations in a memo to the Commissioners' Techhical Assistants.
5/30/84	Commission meeting to discuss technical concerns expressed in Differing Professional Opinion by staff engineers and regional inspectors, as well as legal concerns expressed by OGC staff member.
8/27/84	NRC Executive Director for Operations (EDO) initiates a comprehensive review of current fire protection issues by the Fire Protection Policy Steering Committee (FPPSC). The FPPSC was tasked to examine all current licensing, inspection, and technical fire protection issues, and to develop policy recommendations aimed at expediting Appendix R compliance for older plants and assuring consistent levels of fire protection safety at all plants.
10/2/84	FPPSC meets with headquarters and regional fire protection engineers to obtain their candid views on all current fire protection issues.
10/26/84	The FPPSC complete their review of current fire protection issues and report their findings to the EDO. The FPPSC support the proposed new Appendix R guidance package (with only minor changes) as the official agency position on all Appendix R interpretation issues covered therein. The FPPSC report is distributed to all cognizant program and regional office organizations for comment.
12/10/84	The NRC EDO identifies questions raised by internal comments on the FPPSC that need to be answered before proceeding to the Commission for decision on Appendix R issues. NRC staff is directed to release FPPSC report to PDR for comment by interested parties, and to prepare a Commission Paper on this matter taking into account comments received.
1/15/85	NRC staff issues Generic Letter 85-01, transmitting FPPSC report to operating reactor licensees and requesting comment.

6/24/85	NRC staff completes fire protection Commission Paper, taking into account comments received on FPPSC report, and transmits to the EDO a comprehensive fire protection package for final consideration by the Commission.
7/24/85	The Committee for Review of Generic Requirements (CRGR) reviews the final fire protection package as requested by the EDO. The Committee concludes that the detailed guidance proposed by the NRC staff in the fire protection package can be usefully applied in facilitating the implementation of Appendix R, and recommends that it be sent forward for Commission consideration subject to several minor changes.
9/17/85	Commission Paper (SECY-85-306) containing final NRC staff recommendations on implementation of Appendix R is sent to the Commission.
10/3/85	Commission meeting to discuss SECY-85-306. Current views of fire protection technical staff who submitted DPO are requested. (Current views were provided in memos dated 9/20/85, 10/25/85 and 11/14/85.) Several additional items requiring further attention or modification by NRC staff were also identified by the Commission. (These items were addressed subsequently by the staff in SECY-85-306A on 12/3/85, and in SECY-306B on 12/19/85.)
10/24/85	OGC provides to Commission a legal analysis of new Appendix R interpretations proposed by NRC staff in SECY-85-306. OGC concludes that all but one of the interpretations are legally correct and that legal concerns about another could be overcome by a strong technical safety argument supporting the new interruption. This resolves concerns expressed by OGC staff member in 5/29/84 memo to Commission.
11/27/85	Recommended resolution of technical staff DPO opposing new Appendix R interpretations is submitted to Director, NRR, in accordance with applicable NRC procedure (NRC Manual Chapter 4125). Finding of designated official is that the DPO fails to justify modification of the NRC management decision to develop new Appendix R interpretations and guidance to facilitate implementation of Appendix R.
3/7/86	Commission approves issuance of Generic Letter (GL-86-10) to licensees promulgating new Appendix R interpretations and guidance.

4/24/86	NRC staff issues Generic Letter 86-10, "Implementation of Fire Protection Requirements".
3/27/87	SECY-87-84 sent to Commission by NRC staff summarizing Appendix R inspection activities and escalated enforcement actions, and recommending final disposition of several long pending enforcement actions.

Fire Protection Guidance Issued Since January 1, 1975:

IE Information Notices

No. 83-41: Actuation of fire suppression systems causing inoperability of safety related equipment.

No. 83-69: Improperly installed fire dampers at nuclear power plants.

No. 83-83: Use of portable radio transmitters inside nuclear power plants.

*No. 84-09: Lessons Learned From NRC Inspections of Fire Protection Safe Shutdown Systems (10 CFR 50, Appendix R)

Standard Review Plan

9.5.1, Rev. 1 Fire Protection System, dated 5/1/76

9.5.1, Rev. 2 Fire Protection Program, dated 03/78

9.5.1, Rev. 3 Fire Protection Program, July 1981.

Regulations

10 CFR Part 50: Proposed fire protection program for nuclear power plants operating prior to January 1, 1979, dated May 29, 1980. Federal Register Vol. 45, No. 105, 36082.

10 CFR Part 50: Fire protection program for operating nuclear power plants, dated November 19, 1980. Federal Register Vol. 45, No. 225, 76602.

10 CFR Part 50: Fire protection rule corrections, dated September 8, 1981. Federal Register Vol. 46, No. 173, 44734.

Generic Letters

NOTE: The following documents were obtained from the Palisades file Docket No. 50-255. Similar documents should be in the file for other operating facilities. The dates may vary slightly.

1. Letter dated 9/28/76 - Enclosing App. A to BTP APCSB 9.5-1 and supplementary guidance on information needed for fire protection program evaluation.
2. Letter dated 12/1/76 - Enclosing sample Technical Specifications and an errata sheet.
3. Letter dated 8/19/77 - Enclosing "Nuclear Plant Fire Protection Functional Responsibilities, Administrative Controls and Quality Assurance."
4. Letter dated 6/8/78 - Re: Manpower requirements for operating reactors.
5. Letter dated 9/7/79 - Re: Minimum fire brigade shift size.

6. Letter dated 9/14/79 - Enclosing staff positions - safe shutdown capability.

7. Letter dated 10/31/80 - Enclosing new 10 CFR 50.48 regarding fire protection schedules for operating nuclear power plants.

8. Letter dated 11/24/80 - Enclosing a copy of revised 10 CFR 50.48 and new App. R to 10 CFR 50, and a summary of open items from the SER for the BTP APCSB 9.5-1 review.

9. Letter dated 2/20/81 - Generic Letter 81-12 identifying information needed for NRC review of modifications for alternative shutdown capability.

10. Letter dated 4/7/82 - Provided clarification to Generic Letter 81-12 and guidance on information needed for NRC review of exemption requests.

11. Letter dated 10/6/82 - Generic Letter 82-21; provided criteria for annual, biennial, and triennial audits required by Technical Specifications.

*12. Letter dated 10/19/83 - Generic Letter 83-33; NRC Positions on Certain Requirements of Appendix R to 10 CFR 50.

Staff Generic Positions

1. Letter, Denton to Bernsen, dated 4/20/82 - Control room fires.

*2. SECY 83-269, dated July 5, 1983 - Attachments B and C.

3. Memo, Eisenhut to Olshinski, dated 12/30/83 - Physical independence of electrical systems.

4. Memo, Eisenhut to Jordan, dated 10/24/83 - Bullet resistant fire doors.

*Staff positions regarding the need for certain exemptions delineated in this guidance document have been revised per the "Interpretations of Appendix R".

(C) Did the NRC's fire protection engineers have any role in drafting the "Interpretations" document sent to the Commissioners? If not, why not?

ANSWER.

The fire protection engineers in the Office of Nuclear Reactor Regulation received a draft version of the "Interpretations" document for review and comment. Some of their comments were later incorporated, in part, in the published version. An example of a comment incorporated pertains to Interpretation No. 4, Fire Area Boundaries. The fire protection engineers expressed concern that the fire hazards analyses used to justify fire area boundaries might not be comprehensive and conservative. Subsequently the following statement was added to the report: "Although not required, licensees may submit their evaluations for staff review and concurrence." Licensees were encouraged to submit these evaluations to the staff since they understood the enforcement risks associated with presenting an inadequate evaluation to NRC inspectors during the planned Appendix R compliance inspections.

QUESTION 7. Beginning in March 1984, the NRC held the first of five regional workshops to discuss Appendix R. Did NRC staff fire protection engineers support the Appendix R guidance being discussed at those workshops?

ANSWER.

The Appendix R guidance discussed at the regional workshops encompassed the new interpretations, discussed above, as well as proposed responses to a significant number of industry questions. In its final form, the proposed guidance, which was distributed during the workshops, was later included in Generic Letter 86-10. The fire protection engineers generally supported the staff responses to the industry questions. They did not, however, agree with all of the new interpretations of Appendix R (refer to Question 6C). The prospect of discussing the interpretations at the workshops as official NRC policy prompted members of the fire protection staff to write a differing professional opinion, which was issued before the first workshop in Chicago.

QUESTION 8. On May 2, 1984, a majority of the NRC's fire protection staff filed a Differing Professional Opinion (DPO) concerning the "Interpretations" document of the new guidelines.

(A) Describe the specific issues discussed by the fire protection engineers in their DPO.

ANSWER.

The fire protection engineers believed that the new interpretations were contrary to existing guidance, would result in delays in the resolution of Appendix R issues, and would result in an inconsistent level of fire safety from plant to plant. The specific bases for their conclusions are contained in the Differing Professional Opinion, dated May 2, 1984, a copy of which is attached.

Attachment:
Differing Professional Opinion

QUESTION 8(A) Attachment

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555

MAY 2 1984

MEMORANDUM FOR: Robert L. Ferguson, Section Leader
Fire Protection Section
Chemical Engineering Branch, DE

FROM: Randy Eberly, Fire Protection Engineer (CMEB)
Dennis Kubicki, Fire Protection Engineer (CMEB)
Chuck Ramsey, Fire Protection Engineer (RO: III)
John Stang, Fire Protection Engineer (CMEB)
Joe Ulie, Fire Protection Engineer (RO: III)

SUBJECT: DIFFERING PROFESSIONAL OPINION - "INTERPRETATIONS OF APPENDIX R"

EXECUTIVE SUMMARY

Since 1982, the NRR fire protection staff has performed their review of Appendix R exemption requests to a consistent basis. This basis has been formally issued in Generic Letter 83-33. New interpretations of the basic Appendix R requirements have been developed. These new interpretations are contrary to existing guidance and will permit neither a timely nor consistent resolution of Appendix R deviations. Specific recommendations for resolution of the issues are proposed.

Background

During our reviews of a significant number of Appendix R exemption requests, it became apparent that many utilities had not assessed compliance with the Rule on the basis of valid fire areas as defined in our Branch Technical Position. In addition, some utilities did not provide complete fire detection and automatic fire suppression systems on the basis of recognized industry practice (as defined by the National Fire Protection Association) and sound fire protection engineering principles. As a result, Generic Letter 83-33 was issued to further clarify our position and to avoid future conflict. To the extent that utilities significantly deviated from these positions, resolution was attained through the exemption process under the time constraints imposed by 10 CFR 50.48. Since April 1982, when the staff began reviewing significant numbers of exemption requests, a consistent basis has been established for the level of safety that must be achieved in order to deviate from the Rule. Contrary to this established guidance and against specific recommendations by the staff, new guidance, in the form of intepretations of Appendix R, was developed in support of the Regional Appendix R workshops.

1. Prevailing Staff View

The recently drafted "Interpretations of Appendix R" states that licensees, that have not assessed compliance with Section III.G of Appendix R on the basis of fire areas or with the provision of fire detection and suppression systems throughout a fire area as delineated in Generic Letter 83-33, must perform an "evaluation to assess the adequacy" of fire area boundary construction, and detection and suppression system coverage. This evaluation does not have to be submitted on the docket for NRR review as is currently done under the exemption process and no guidance is furnished as to the nature of the evaluation.

If, during the audit, the inspection team takes issue with the adequacy of fire area boundaries or the extent of fire suppression and detection, the licensees would present the evaluation as justification for the existing configuration and attempts at resolution would be undertaken If the issue(s) could not be resolved, it (they) would be deferred as an "unresolved item" for subsequent NRR action.

2. Originators Opinion

Appendix R was promulgated as a means of expediting resolution of post-Browns Ferry SER fire protection open items and to provide a basis for consistent resolution of them. The lack of a requirement in the new "Interpretations" for timely, advance documentation of the licensee's analyses of deviations from the staff positions of Generic Letter 83-33 undermines the basis for originally promulgating Appendix R because, by requiring no prior review and deferring resolution of issues to the audit, a significant time delay will result. In addition, due to the varying composition of the audit teams, the resolution of technical issues may vary to a significant degree. For example, under similar conditions at different plants, one audit team may accept a partial fire suppression system while another team may insist upon complete area-wide protection.

Additional Appendix R audits are scheduled to occur well into the future. It is also anticipated that unresolved audit issues would require NRC action, which would necessitate further delays. These delays would not be expected under the staff's previous approach because all significant technical issues would be resolved by NRR in advance of the audit.

To the extent that plant modifications would be necessary to satisfy staff concerns, these modifications would be further delayed because agreement as to the nature of the modifications would not be reached until some time after the audit. Whereas, under our previous approach, agreement is reached at an earlier stage and the schedule for completing the modifications commences well in advance of the audits, normally at the time the SER is issued.

- Under the new interpretations, no specific guidance is provided to the utilities regarding the nature of the evaluations that they are expected to perform. Based on the staff's previous experience, we feel that licensees are likely to conduct evaluations which vary significantly as to the degree of comprehensiveness, completeness, and the application of sound fire protection engineering principles. Consequently, the staff is likely to find that all relevant considerations have not been taken into account and that an equivalent level of safety has not been provided. For example, a utility may conclude as some have attempted that a particular fire protection configuration, such as a partial height fire barrier between redundant shutdown divisions, is adequate based on an assumption that no "credible" fire will occur. However, there is no generally recognized method to predict the location, magnitude and resulting damage of a fire in any location, consequently design basis protection is mandated by the rule.

  Licensees, confronted with the inadequacy of their evaluation at the time of the audit, may request additional time to conduct a more thorough evaluation or refer the matter to NRR for approval, similar to the exemption process. This will only result in further delays toward eventual Appendix R compliance.

  In addition to the time considerations involved, areas that are not in compliance with the Rule may be construed by some utilities as being acceptable although the same conclusion will not be held by the staff. Therefore, under this approach, there is no way to ensure a consistent level of fire safety.

- Under the new interpretations, licensees that have already committed to fire protection modifications in conjunction with previously requested and approved exemptions may now elect to delete their commitments from these modifications and propose a new approach which may provide a lesser degree of safety and which would not be ultimately acceptable to the staff.

- Under the new interpretations, greater reliance is placed upon the Appendix R audit. However, an audit, by its very nature, is a limited scope effort. Only a sampling of areas and systems is reviewed. Since it is a limited effort, the staff would not have reasonable assurance that all potentially significant safety problems were discovered.

  If, under the new interpretations, an audit team discovered a number of safety problems within some areas of the sample, there is no mechanism to resolve the larger question of the adequacy of the protection in the un-audited areas. As a result, more areas of the plant may be in non-compliance with potentially serious consequences if a fire should occur.

- Because of the new interpretations it will now be the staff's position that all that a utility needs to do to justify fire area boundaries and the extent of fire detection and suppression is an "evaluation". It is therefore likely that an individual utility will have some form of evaluation available for the audit team. If serious safety problems are discovered during an audit, the inspection team will not be in a position to efficiently resolve or cite the utility for the condition because they have literally done what the new interpretations require. Also, there is nothing specifically written or implied in the interpretations that utilities will be sanctioned or cited for inadequate evaluations. With the reduced likelikhood of enforcement action, utilities will be less inclined to take the Rule seriously and the staff itself will be increasingly frustrated in their efforts to achieve resolution of unresolved issues.

- The new interpretation regarding the nature of fire area boundaries, which states that boundary walls and floor/ceiling assemblies need not be continuous, conflicts with previous staff criteria as defined in the Branch Technical Positions. Therefore, the technical basis for our review has been changed. This change has been effected as a result of utility initiatives, via management directive, without following usual appropriate NRC procedures or considering relevant staff input.

- At a meeting between the staff and the Nuclear Utilities Fire Protection Group in March 1983, it was agreed that the Group would propose criteria for the NRC acceptance of partial coverage suppression and detection systems. To this date, the Group has been unable to provide any criteria due to the number of variables that must be considered in each case. It is therefore doubtful that the individual utilities will be able to assess Appendix R compliance of such systems based on an evaluation, as permitted by the recent interpretations.

3. Originators Assessment of Consequences

The adoption of the new "Interpretations of Appendix R" undermines the Rule by causing significant delays associated with the identification and resolution of fire protection related safety problems. It may also result in a lack of consistency in the resolution of safety deviations. The interpretations also change the technical basis of the Rule and our review efforts by redefining the nature of fire area boundaries.

4. Related Efforts

None

5. Recommendations

1. Do not issue the "Interpretations of Appendix R" as presently written, but as amended in by Enclosure 1.

2. Re-affirm that the staff positions as delineated in Generic Letter 83-33 are the basis for resolving technical issues associated with compliance with Appendix R.

3. Mandate that, to the extent utilities deviate from the positions of Generic Letter 83-33, they should justify such deviations via a detailed fire hazard analysis which must be submitted to the staff for review under the exemption process.

R. Eberly
Randy Eberly
Fire Protection Engineer
Chemical Engineering Br.

Dennis J. Kubicki
Dennis Kubicki
Fire Protection Engineer
Chemical Engineering Br.

John Stang
John Stang
Fire Protection Engineer
Chemical Engineering Br.

R. Eberly
FOR Chuck Ramsey
Fire Protection Engineer
Region III

R. Eberly
FOR Joe Ulie
Fire Protection Engineer
Region III

Enclosure: As stated

cc: V. Benaroya
W. Johnston
H. Denton
E. Case
V. Stello
T. Wambach
W. Shields
L. Whitney
J. Craig
N. Fioravante
D. Parr
J. Wermiel
S. Trubatch
T. Chan
D. Notley

Enclosure 1

AMENDED INTERPRETATIONS OF APPENDIX R

1. Fire Area Boundaries

Section III.G of Appendix R sets forth the requirements for fire protection for safe shutdown capability on the basis of fire areas.

A fire area is defined in NUREG 75/087 and 0800 as that portion of a building or plant that is separated from other areas by boundary fire barriers (walls, floors and ceilings with any openings or penetrations protected with seals or closures having a fire resistance rating equal to that required of the barrier).

Based on the guidance in Appendix A to BTP ASB 9.5-1, the boundary fire barrier should have a 3-hour fire resistance rating or it should be shown by analysis that its fire rating exceeds with conservative margin, the fire loading in the fire areas on either side of the boundary fire barrier. The boundary fire barrier need not be rated at 3-hour unless the fire boundary warrants such a rating.

Where fire area boundaries were not approved during the Appendix A review, or where such boundaries are not continuous barriers with all penetrations sealed to prevent fire propagation, licensees must evaluate and justify the adequacy of the boundary construction. All unsealed openings must be identified and justified. Particular attention should be given to stairways and hatchways. This analysis must be performed by a fire protection engineer and, if required, a systems engineer. Licensees must submit their evaluations of these deviations for Staff review and must have these evaluations available for subsequent NRC audits.

2. Automatic Detection and Suppression Coverage

Sections III.G.2.b and III.G.2.c of Appendix R state that "In addition, fire detectors and an automatic fire suppression system shall be installed in the fire area..." Other provisions of Appendix R also use the phrase "fire detectors and an automatic fire suppression system in the fire area..." (see e.g., Section III.G.2.e).

To comply with these requirements, suppression and detection sufficient to protect against the hazards of the area must be installed. Full coverage fire detection and suppression systems fully comply with the regulation. Detection and suppression systems with less than full area coverage may be adequate to comply with the regulation. Where full area suppression and detection is not installed, licensees must perform an evaluation to assess the adequacy and necessity of partial suppression and detection in an area. The evaluation must be performed by a fire protection engineer and, if required, a systems engineer. Licensees must submit their evaluations to the Staff for review. The evaluations must be available for subsequent NRC audits.

Where a licensee is providing no suppression or no detection, an exemption must be requested.

3. Fire Damage

In Section III.G of Appendix R, the Commission has specified means for ensuring that structures, systems and components important to safe are free of fire damage (see e.g., Section III.G.2.a, b and c), that is the structure, system or component under consideration is capable of performing its intended function before, during and after the postulated fire. Licensees seeking exemptions from these requirements of the regulation must show that the alternative proposed will also provide reasonable assurance that necessary structures, systems and components are undamaged by the fire suppression agent and are therefore capable of performing their intended functions before, during and after the postulated fire.

4. Alternative or Dedicated Shutdown

Section III.G.3 of Appendix R provides for "alternative or dedicated shutdown capability and its associated circuits, independent of cables, systems or components in the area, room, or zone under consideration". While the supplementary information issued with the Rule has reflected a preference for alternative shutdown to be independent of the fire area under consideration, this is not always possible. In such cases alternative shutdown in the same fire area but independent of the room or the zone under consideration is acceptable if it can be demonstrated by detailed fire hazard analysis that a single fire will not disable both trains of redundant equipment and the alternate shutdown capability.

QUESTION 8. (continued) - 2 -

(B) What recommendations were made in the DPO?

ANSWER.

Taken from pages 4 and 5 of the enclosed DPO, the recommendations were:

1. Do not issue the "Interpretations of Appendix R" as presently written, but as amended by Enclosure 1 to the DPO.

2. Reaffirm that the staff positions as delineated in Generic Letter 83-33 are the bases for resolving technical issues associated with compliance with Appendix R.

3. Mandate that, to the extent utilities deviate from the positions of Generic Letter 83-33, they should justify such deviations via a detailed fire hazard analysis which must be submitted to the staff for review under the exemption process.

QUESTION 8. (continued) - 3 -

(C) What was the rationale given by the fire protection engineers in making their recommendations?

ANSWER.

The rationale given was that, by reaffirming the positions expressed in Generic Letter 83-33, the staff would avoid the technical inconsistencies and anticipated delays associated with the new interpretations of Appendix R.

QUESTION 9. During the May 30, 1984 Commission meeting on fire protection, a staff attorney from the Executive Legal Director's office stated that the intent of the "Interpretations" document was to arrive at interpretations which were acceptable from a legal standpoint and carried out the objectives of the Executive Director for Operations and the utilities. In developing the "Interpretations" document, were the views of the NRC's fire protection engineers taken into account? If not, why not?

ANSWER.

The views of the fire protection engineers were taken into account and some of their comments were incorporated in the published version of Generic Letter 86-10. Their views were actively solicited during the time the initial draft "Interpretations" document was being considered, by the Commission at the meeting on May 30, 1984, by the Fire Protection Policy Steering Committee in their review of fire protection issues for the EDO, and again by the Commission as part of the Commission's final consideration of Generic Letter 86-10. The engineers' views were also considered extensively by the designated DPO official in connection with the processing of their DPO.

1/27/88 BREAUX Q9

QUESTION 10: In May 1984, a member of NRC's Office of General Counsel staff wrote a memorandum to the Commissioners technical assistants expressing his legal concerns regarding the new Appendix R interpretations.

(A) Specifically, what issues did the attorney raise in his memorandum?

ANSWER.

The attorney, speaking on his own behalf, stated his belief that some of the Appendix R interpretations might constitute significant changes in the rule, and might therefore require notice and comment rulemaking before adoption. See the attached copy of the memorandum, at 1. In particular, the memorandum argued that under the new interpretations, and contrary to the intent of the rule, (1) fire boundaries did not have to be completely sealed or have uniform fire resistance at all points; (2) hot shutdown of the reactor within 72 hours after a fire was good enough, rather than cold shutdown in the same period; (3) alternative and redundant systems did not have to be free from damage by fire suppression agents; (4) automatic detection and suppression systems in a given area did not have to cover the entire fire area; and (5) alternative or dedicated plant shutdown systems could be located in the same fire area as the systems to which they were the alternatives. The memorandum also raised what it called "minor" issues about three other interpretations. See Memorandum at 6-7.

Attachment:
5/29/84 OGC Memorandum (Attachment 1)

1/27/88 BREAUX Q10

QUESTION 10. (continued) -2-

(B) How did the Commission resolve the issues raised in the memorandum?

ANSWER.

The issues were thoroughly aired in documents prepared at the Commission's direction by the staff, the staff's legal office, and the Commission's legal office (there were at that time two legal offices in the agency). Ultimately, the Commission required the interpretations document to be modified in accord with the recommendations made to the Commission by its legal office, the Office of the General Counsel (OGC). See the attachments listed below. On the basis of a lengthy analysis of both the legal and the technical issues, OGC agreed in large part with the May 1984 Memorandum on two issues (nos. 1 and 3 in the list given in answer to part "A." of this question), and otherwise supported the staff, though sometimes with arguments that significantly differed from the staff's.

For instance, on the second issue raised by the May 1984 Memorandum, OGC concluded that the text and history of the rule clearly showed that the rule did not simple-mindedly require licensees to be able to go to cold shutdown within 72 hours after a fire. Rather, the rule required that licensees have fire protection sufficient to permit them either to repair their normal cold shutdown equipment within 72 hours after a fire and then proceed to cold shutdown or, failing that, to achieve cold shutdown with their alternate cold shutdown equipment within 72 hours after failure to repair the normal equipment. The alternate equipment is thus held to a higher standard than the normal equipment. OGC felt that the staff had not sufficiently emphasized this difference in standard. See attachment 3 at 6-10.

In general, OGC found that neither the May 1984 Memorandum nor the staff had paid close enough attention to the text and history of the rule, and that the staff may sometimes have required more than the rule required.

Attachments:
SECY-85-306, "Staff Recommendations Regarding the Implementation of Appendix R to 10 CFR 50", esp. 8 (staff reply to May 1984 Memorandum) and Enclosure 8 (drafted by the Office of the Executive Legal Director). (Attachment 2)

October 24, 1985 OGC Memorandum analyzing issues. (Attachment 3)

March 7, 1985 Memorandum from Chilk to Stello (Commission adoption of OGC positions). (Attachment 4)

List of documents for Question 10:

Attachment 1:	Memo for D. Garner, J. Joosten, S. Chestnut, J. Austin and J. Meyer from S. Trubatch, OGC dated 5/29/84 re Guidance for Implementation of Fire Protection Requirements for Operating Reactors, 10 CFR 50, Appendix R
Attachment 2:	SECY-85-306, subject: Staff Recommendations Regarding the Implementation of Appendix R to 10 CFR 50 dated 9/17/85
Attachment 3:	Memo to Chairman/Commissioners from M. G. Malsch, DGC dated 10/24/85 re: Staff Interpretations of Appendix R
Attachment 4:	Memo to V. Stello, Jr. from S. Chilk, SECY dated 3/7/86 re: Staff Requirements - SECY-85-306/305B, "Staff Recommendations Regarding the Implementation of Appendix R to 10 CFR 50"

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

QUESTION 10: Attachment

May 29, 1984

MEMORANDUM FOR: D. Garner
J. Joosten
S. Chestnut
J. Austin
J. Meyer

FROM: Sheldon L. Trubatch, OGC

SUBJECT: GUIDANCE FOR IMPLEMENTATION OF FIRE PROTECTION REQUIREMENTS FOR OPERATING REACTORS, 10 C.F.R. 50, APPENDIX R

On March 22, 1984, the staff informed you of its extensive interpretations of the fire protection requirements in 10 C.F.R. Part 50, Appendix R. I believe that some of these interpretations are inconsistent with the fire protection requirements. In addition, five fire protection engineers on the NRC staff have filed a differing professional opinion questioning some of the interpretations of Appendix R. These engineers and I believe that some of the interpretations may constitute significant changes in the rule made without notice and comment rulemaking. Accordingly, I recommend that when the Commission meets with the staff it should: (1) discuss the nature and extent of the interpretations of Appendix R; (2) determine the acceptability of the substance of the changes made by the interpretations; and (3) decide whether notice and comment rulemaking is necessary to adopt the interpretations found acceptable by the Commission.

The Interpretations of Appendix R

Staff has made six major interpretations of the fire protection regulations and several minor ones in the course of answering licensees' questions. Of the six major interpretations, several appear to substantially modify Appendix R. Some of these interpretations were also the subjects of the differing professional opinion referred to above. The interpretations at issue are discussed seriatim below.

a. Fire Boundaries

The concept of fire boundaries is central to the concept of fire protection design. Fire boundaries are partitions -- walls, ceilings and floors -- which divide a building into

CONTACT:
X-43224

fire areas. These fire areas are the basis for determining whether redundant or alternate equipment will not be damaged by one fire. In general, two sets of equipment are redundant or provide adequate alternatives if they are in different fire areas or sufficiently separated within a fire area.

Fire boundaries which define fire areas are generally understood to be delineated by partitions each of which has a surface area with a uniform "fire rating," i.e., a uniform ability to retard the spread of fire, heat and combustion products. For example, if a wall has a doorway cut into it, that doorway must contain a door which has the same fire rating as the surrounding wall.

The proposed interpretation of Appendix R would permit licensees to use fire boundaries which do not have uniform fire ratings. Some boundaries would not even be completely sealed. Fire areas could be defined by partial boundaries if the licensee has determined that those partial boundaries are adequate. The licensee's determination would be based on an evaluation not subject to prior review by NRR, but subject to subsequent audit by an inspection team.

[illegible]
emphasized
flexibility through
design-
at by
fire hazards
analysis

When the Commission promulgated Appendix R, it established a three-hour fire barrier or its equivalent as the appropriate method for protecting redundant or alternate equipment in the same fire areas. This choice of fire barrier was based on the commonly used fire barriers for delineating fire areas in commercial buildings, which present far less potential for adverse consequences in the event of a fire. The Browns Ferry fire clearly illustrated the consequences of not requiring penetrations to be sealed by material having the same fire rating as the surrounding barriers. Appendix R was intended to complete the fire modifications deemed necessary after Browns Ferry. Therefore, to now interpret Appendix R so as not to incorporate a fundamental lesson learned at Browns Ferry would appear to directly contradict the Commission's intent in promulgating Appendix R.

Members of the fire protection staff are also critical of this interpretation. They believe that it will lead to inordinate delay in licensee compliance with Appendix R and may result in the acceptance of inconsistent alternatives to three hour barriers at different plants. The staff believes that delay will arise from the deferral of NRC's review of alternatives until after they have been installed by licensees. Even if the NRC disagrees with a licensee's evaluation of the adequacy of an alternative, it will remain in place while the staff and licensee argue over the acceptability of that alternative. The staff believes that inconsistent alternatives will be accepted because different audit teams will inspect different plants. Such delays and inconsistencies could be avoided if all licensee alternatives were reviewed in advance by the same members of the fire protection staff.

Delay and inconsistency were two of the fundamental reasons which motivated the Commission to promulgate Appendix R. While some licensees diligently upgraded their plants in response to the post-Browns Ferry fire protection positions by the staff, other licensees vigorously resisted making expensive changes. Moreover, the staff had reported to the Commission that the staff had accepted widely different fire protection modifications at different plants because different staff members had reviewed different plants.

In CLI-80-21, the Commission clearly indicated that it wanted the upgrading of fire protection to be completed promptly and no later than June 30, 1982. While the original deadline was not met, the final rule in 10 C.F.R. 50.48 incorporated new deadlines which the Commission believed could be met. As for inconsistencies between plants, the Commission chose to proceed by rule rather than by order to ensure a uniform fire protection program.

Staff's interpretation of Appendix R would substantially undo much of what the Commission wanted to accomplish by promulgating Appendix R. Therefore, the Commission should request the staff to explain how this interpretation of Appendix R is consistent with the basic goals the Commission sought to implement by promulgating Appendix R.

b. Cold Shutdown

The issue here is how soon after a fire does an operating reactor have to be brought to cold shutdown. The generally accepted view was that cold shutdown had to be attained no later than 72 hours after a fire. During the rulemaking proceeding on Appendix R and the subsequent litigation over it, some utilities contended that cold shutdown within 72 hours after a fire was unrealistic and unnecessary and that hot shutdown within 72 hours would be good enough.

The current interpretation reads Appendix R to partially adopt the industry position. Under this interpretation, only reactors which have an alternative or dedicated shutdown mode in addition to the normal shutdown modes must be able to achieve cold shutdown in 72 hours. This requirement would not apply to all other reactors which do not require such additional shutdown equipment because their normal shutdown modes satisfy the redundancy criteria. For these reactors which were properly designed initially, Appendix R would not require the attainment of cold shutdown in 72 hours but only the capability to repair within 72 hours the systems necessary to achieve cold shutdown. There would be no minimum time required for achieving cold shutdown.

This interpretation divides reactors into two classes: those capable of achieving the ultimate safe state of cold shutdown no later than 72 after a fire, and those which will only be required to be brought to hot shutdown within 72 hours after a fire. No safety basis for this distinction has been provided. Moreover, this distinction contradicts the Commission's understanding of Appendix R when it was promulgated. The Commission was concerned that all reactors be brought to cold shutdown as quickly as possible after a fire. Thus, this interpretation is arguably a major modification to Appendix R which may require notice and comment before adoption.

c. Fire Damage

Another basic principle of fire protection design is that alternate or redundant structures, systems and components are not damaged by the same fire. In some instances, plants contain redundant equipment which can be damaged by one fire. In some of those cases, licensees sought exemptions from the requirement for redundant structures, systems or components by claiming that there are alternate pathways which achieve the same functions in the plants and which will not be damaged by a fire which would damage the structures, systems or components which are inadequately redundant.

This interpretation will permit the grant of exemptions on a showing that the alternative will be "free from fire damage": a phrase in Part 50 which is understood to mean capable of performing its intended function before, during and after a postulated fire.

The fire protection engineers believe that the definition of "free from fire damage" must also explicitly require the alternative structure, system or component to be undamaged by the fire suppression agent.

When Part 50 was promulgated, the Commission was concerned that fire suppression agents should not disable shutdown equipment. The proposed interpretation does not share that concern. The Commission should ask the staff to explain why it appears to believe that the potential disabling effects of fire suppression agents are no longer a significant safety concern.

d. Automatic Detection and Suppression

An integral component of an overall fire protection plan is the use of automatic detection and suppression systems, *e.g.*, fire and smoke alarms and automatic sprinklers or gas systems. To be effective, these systems usually must cover the entire fire area. The interpretation would permit licensees to use less than full area coverage based on an evaluation subject only to subsequent NRC audit. The fire protection staff is concerned that this variance procedure suffers from the same problems of delay and inconsistencies as the variance procedure for deviations from the requirement for uniformly rated fire boundaries. The Commission should ask the staff to explain why the special exemption procedure for fire protection requirements should not be applied to requests for less than full coverage automatic detection and suppression systems.

e. Alternative or Dedicated Shutdown

Appendix R requires an alternative or dedicated shutdown capability if existing shutdown equipment cannot be separated or otherwise protected from damage by one fire to satisfy requirements for redundancy. An alternative or dedicated shutdown capability has been generally understood to mean a separate system. The new interpretation of Appendix R would permit licensees to locate alternative or dedicated shutdown equipment in the same fire area containing the inadequately redundant equipment as long as that new equipment is independent of the room or zone. No guidance is provided for determining the acceptability of an alternative or dedicated shutdown system so placed. Members of the fire protection staff noted that this interpretation may release licensees from previous commitments to provide a physically separated alternatives or dedicated shutdown capability. At the very least, these members of the fire protection staff would require a detailed fire hazards analysis showing that a single fire would not disable both trains of redundant equipment and the alternative or dedicated shutdown capability.

An alternative or dedicated shutdown capability can be expensive. However, some licensees have installed them and others have committed to them because they were apparently required. By now permitting those licensees who have delayed their compliance with this requirement to avoid it, the Commission will be sending a signal that defiance pays. It was just to avoid this penalization of licensees who complied with regulations that the Commission sought to avoid in setting the compliance schedules in 10 C.F.R. 50.48. Accordingly, the Commission should ask the staff to explain its change of position as a matter of safety and policy.

f. Minor Issues

1. Seismic Events

The reactor coolant pump (RCP) lube oil system contains up to 235 gallons of lubricating oil per pump. Appendix R requires a seismically qualified oil collection system. An exemption can be granted for a collection system which is not seismically qualified if the lube oil system itself is designed to with stand a safe shutdown earthquake (SSE). Under those circumstances, the exemption analysis needs to consider only random leaks from the joints and need not assume that random leaks will occur simultaneously with an earthquake. In my view, the proposed exemption analysis is incomplete because it does require consideration of an accumulation of randomly leaked lube oil which could be discharged from a seismically unqualified leak collection system by a subsequent earthquake. Staff should be requested to explain why this possible scenario has not been included in the analysis.

2. Intervening Combustibles

An alternative to using a fire barrier to protect redundant equipment from damage by a single fire is to locate the equipment so as to be physically separated by a large space with no intervening combustibles. Staff would now interpret "no" intervening combustibles to be "no significant quantities "of intervening combustibles. Such an interpretation reduces the effectiveness of physical separation and may render it a less effective alternative to a fire barrier. Staff should be asked to explain how this interpretation is consistent with the use of physical separation as a substitute for a fire barrier.

3. Oil Cans

Oil in closed cans is not considered as an intervening combustible. But a fire in the vicinity of an oil filled can could heat that oil causing it to vaporize, burst the containing can and then ignite. Staff should be asked to explain why oil in closed cans need not be considered to be an intervening combustible.

QUESTION 10: Attachment 2

September 17, 1985

SECY-85-306

RULEMAKING ISSUE
(Notation Vote)

For: The Commissioners

From: William J. Dircks
Executive Director for Operations

Subject: STAFF RECOMMENDATIONS REGARDING THE IMPLEMENTATION OF APPENDIX R TO 10 CFR 50

Purpose: To provide the Commission with recommendations for expediting and improving the implementation of Appendix R (Fire Protection), and to provide a discussion of related issues raised by a member of OGC and by several fire protection staff members.

Background: The initial inspections for compliance with the safe shutdown provisions of Appendix R to 10 CFR Part 50, at facilities where compliance with Appendix R was believed to be complete by the licensee, revealed a number of instances of noncompliance and enforcement actions were being proposed. In late 1983, the EDO initiated a consultation between headquarters and the regions which concluded that uncertainty still existed over the staff requirements and suggested that a series of regional workshops be organized to discuss fire protection and answer questions from the licensees. The Nuclear Utility Fire Protection Group (NUFPG) organized a meeting to precede these workshops to solicit industry experience in fire protection programs and compile for the NRC questions which they felt needed answering.

The NUFPG also initiated discussions with the staff on whether a licensee may propose an alternative means of complying with certain Appendix R issues covered by Generic Letter 83-33, if backed by a technical justification. In such cases, an exemption would not be needed if an alternative means of

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SECY NOTE: This subject is scheduled for discussion at an Open Meeting at 10:00 a.m., Thursday, October 3, 1985. An advanced copy of this paper was provided Commissioner Offices on September 17.

compliance is provided in areas where Appendix R is non-specific. The result of these discussions was a document called "Interpretations of Appendix R."*

The workshops were held in the spring of 1984. At these workshops a package of NRC guidance was distributed to each attendee which included NRC staff responses to industry questions and the "Interpretations" document. The cover memo for the package explained that it was a draft package which would be issued in final form via a generic letter following the workshops.

During the same timeframe, the staff began to develop enforcement guidance on Appendix R. Draft guidance was developed in the spring of 1984 and it was determined that, until the guidance and the interpretations of the rule were completed, enforcement actions based upon Appendix R should be placed on hold. Four cases arising in late 1983, early 1984 and two more recent cases were and still are in this status.

On May 30, 1984, the staff briefed the Commission on the status of the implementation of Appendix R and discussed the issues raised by several NRC fire protection engineers in a Differing Professional Opinion (DPO) and by a member of OGC. At this meeting, the Commission requested that the implementation guidance be submitted for Commission approval prior to its issuance to industry.

Following the Commission meeting, NRR was requested by the EDO to form a Steering Committee on Fire Protection Policy to examine all current licensing, inspection and technical issues, and to develop policy recommendations aimed at expediting Appendix R compliance for pre-1979 plants. The Steering Committee drew its membership from three of the Regions, IE, and ELD. Richard Vollmer, then of NRR, was Chairman. Following a series of meetings, which included discussions with all agency fire protection engineers, the Steering Committee issued a report to the EDO (Enclosure 1) in October 1984 containing a number of recommendations for improving the consistency of the levels of fire protection safety and for enhancing the implementation of Appendix R.

Following comment by the Program Offices and the regions, the EDO directed in December 1984 that the Steering Committee Report be issued for public comment. Comments were received from the NUFPG, utilities, and consultants. On May 3, 1985, the Fire Protection Steering Committee issued updated recommendations which reflect resolution of these comments (Enclosure 2).

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*This document was later disputed by a member of OGC, and several staff members initiated a differing professional opinion.

Current Status

Although Appendix R became an effective rule in 1981, approximately half of the operating reactors still have outstanding material in for staff review and some facilities are not currently scheduled for compliance until the late 1980s. This situation, as discussed with the Commission in May 1984, has arisen partially because of the complexity of achieving compliance with the Rule for older facilities despite the exemption provisions, and partially because industry did not manage its approach to Appendix R effectively, nor did the NRC fully anticipate the impact of Commission-required backfitting of certain portions of Appendix R. The staff believes that implementation of this guidance, which has been generated in response to industry defined needs, will help bring to closure outstanding issues. The backlog of licensing review extends well into 1986. Some of this could be given back for licensee action, based on this guidance. However, the staff recognizes that additional review work may also be generated.

As discussed previously, the development of this guidance and regional meetings in 1984 resulted from early inspections showing noncompliance with Appendix R. This situation has changed somewhat for the better. Based on a larger sample of ten pre-1979 and twenty post-1979 safe shutdown inspections, improvement has recently been noted in licensee understanding of the analyses needed to establish required post-fire safe shutdown capabilities. Recent inspections have resulted in a significant reduction in the number of deficiencies observed. Some of this is attributable to a better understanding of the requirements as discussed in the regional workshops.

In the past year, we have been inspecting NTOL plants prior to issuing an operating license specifically for the safe shutdown items of Appendix R. Based on the information given out at the workshops, the applicant usually makes a submittal prior to the inspection identifying additional deviations from Appendix R or the staff guidelines. The staff then uses the time before or during the inspection to come to resolution on these deviations. The increased understanding since the workshops has reduced significantly the open items to be resolved at the time of licensing. The inspection results for these new plants show substantial compliance with regulatory requirements.

Discussion: The staff proposes to adopt, in large part, the positions recommended by the Fire Protection Policy Steering Committee for the guidance of the licensees in the implementation of Appendix R.

The Steering Committee's principal recommendations are as follows:

1. Promptly issue a generic letter (Enclosure 3) informing all licensees that:

    a. Extensions to 50.48c schedules will no longer be granted except where a licensee has an approved "living schedule."

    b. Inspections will include plants with uncompleted modifications as well as plants with completed modifications. In addition, licensees may request an inspection to help avoid costly design and implementation decisions with which the staff may disagree.

    c. Documentation of valid analysis supporting fire protection features must be available for inspection.

    d. Quality assurance measures should be in effect to assure that fire protection systems will function as intended.

    e. Licensees are required to notify the NRC when deficiencies are discovered pursuant to 10 CFR 50.72 and 50.73.

    f. A standard fire protection license condition is available which will clarify the licensee's options in making modifications to the fire protection program.

2. Accompany the generic letter with the following guidance documents:

    o Interpretations of Appendix R (Enclosure 4).*

    o Appendix R Questions and Answers (Enclosure 5).

    o Fire Protection License Condition (Enclosure 6).

3. Adoption of proposed Guidance For Enforcement Actions Concerning Fire Protection Requirements (Enclosure 7).

Further consideration of the positions taken by the Steering Committee regarding extensions to 50.48(c) schedules and a proposed standard fire protection license condition have raised policy and legal issues which are worthy of the Commission's attention.

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*These interpretations represent staff positions, and should not be considered as official agency interpretations issued by the General Counsel. See 10 CFR 1.32; 10 CFR Part 8.

Schedular Exemptions

The Steering Committee's position is that the Appendix R implementation schedule was established by the Commission in 10 CFR 50.48(c), promulgated together with Appendix R in November of 1980. Allowing time to evaluate the need for alternative or dedicated shutdown systems, which require prior NRC approval before installation, and time for design of and NRC review of such systems, the Commission envisioned that implementation of Appendix R would be complete in four to five years, or approximately by the end of 1985. The schedule for many fire protection modifications was initially tolled by the filing of exemption requests under 50.48(c)(6). This delay was anticipated by the rule. In addition, the staff has issued numerous exemptions to 50.48(c) deadlines pursuant to 10 CFR 50.12. The latest completion date approved so far is in 1987. Some licensees have proceeded expeditiously to implement Appendix R and are now finished or nearly finished with that effort. Others have engaged in lengthy negotiations with the staff while continuing to file requests for schedule extensions, and thereby have barely begun Appendix R modifications needed to comply with Sections III.G and III.L. Schedule extension requests have been received seeking implementation dates of 1990 and beyond.

As the 50.48(c) schedule was intended to be a one-time schedule commencing in the 1980-1982 time frame and ending in the 1985 time frame, extensions well beyond this schedule (particularly where major modifications remain to be completed) undermine the purpose of the schedule which was to achieve expeditious compliance with NRC fire protection requirements. The staff believes that further wholesale extension of fire protection schedules via exemption from 50.48(c) requirements is legally unsound and could expose the Commission to a court challenge.

On the other hand, there are a number of considerations favoring granting additional schedular exemptions where a genuine hardship can be established. Recent PRA's have shown that the contribution of fires to core melt probabilities is in the 10^{-4} to 10^{-5} range for reactors with no alternate shutdown capability, and about a factor of 20 improvement if fully protected. Recent inspections are showing greatly improved compliance, a large percentage of the necessary changes have already been completed, and defense in depth provides knowledge that individual deficiencies do not cause significant safety effects. As a consequence of these considerations, the generic letter has been modified to state that additional schedular exemptions may be requested under 10 CFR 50.12, but such requests will be granted sparingly based on an evaluation using the following criteria:

1. The utility has, since the promulgation of Appendix R in 1980, proceeded expeditiously to meet the Commission's requirements.

2. The delay is caused by circumstances beyond the utility's control.

3. The proposed schedule for completion represents a best effort under the circumstances.

4. Adequate interim compensatory measures will be taken until compliance is achieved.

License Conditions

Most licenses contain a fire protection license condition. License conditions for plants licensed prior to January 1, 1979, contain a condition requiring implementation of modifications committed to by the licensee as a result of the reviews against the Branch Technical Position. These license conditions were added by amendments issued between 1977 and February 17, 1981, the effective date of 10 CFR 50.48 and Appendix R. In April 1981, the Commission decided that, until a fire protection rule for future plants was approved, "new licenses (those issued after January 1, 1979) should contain a condition requiring compliance with commitments made by an applicant and agreed to by the staff."

Because of the evolving nature of the approach to fire protection, license conditions for plants licensed after Janaury 1, 1979, vary in scope and content. Some only list open items that must be resolved by a specified date or event, such as exceeding five percent power or the first refueling outage. Some reference a commitment to meet Appendix R; some reference the Final Safety Analysis Report (FSAR) and/or the NRC staff's SER. These variations have created problems for licensees and for NRC inspectors in identifying the operative and enforceable fire protection requirements at each facility.

These license conditions also create difficulties because they do not specify when a licensee may make changes to the approved program without requesting a license amendment. If the fire protection program committed to by the licensee is required by a specific license condition, the provisions of 10 CFR 50.59 may not be applied to make changes without prior NRC approval. Thus licensees may be required to submit amendment requests even for relatively minor changes to the fire protection program. One means of reducing this diversity and to increase uniformity is to propose a uniform license condition which clearly identifies the approved fire protection program for the facility and specifies the conditions under which it may be modified. The Steering Committee has proposed that this be recommended as an option to the licensees and remain a requirement for new plants. Some industry opposition has been expressed and the CRGR expressed the view that it is doubtful that many operating plants will voluntarily exercise this option.

At the time that the Commission required the license condition on new plants it was expected to be an interim measure until a fire protection rule was developed. Since that time, the staff has recommended and the Commission has agreed that a rule for new plants was not needed. An alternative approach, recommended by CRGR, which also has the virtue of clearly identifying the approved fire protection program and specifying the conditions under which it may be modified, but without elevating fire protection to a status above that of other safety related plant features, is to incorporate the fire protection program for all plants into the FSAR for the facility and remove the requirement for a license condition. In this manner, the fire protection program, including the systems, the administrative controls, the organization, and other plant features described in the FSAR will be on a consistent status with other plant features described in the FSAR. The provisions of 10 CFR 50.59 would then apply directly for changes the licensee desires to make in the program. Some questions of enforceability have been raised with regard to this approach.

The generic letter has been modified to state that licensees should include the fire protection program in the next update of their FSAR with the intent that thereafter modifications to the program could be made in accord with 10 CFR 50.59. One proviso would be necessary, that the "accident previously considered" in the context of the unreviewed safety question determination under 10 CFR 50.59 be the postulated fire in the fire hazard analysis for the fire area affected by the change. The staff would then entertain application for amendment to remove the fire protection license condition. The staff is continuing to evaluate various other approaches to the elimination of the license conditions, including the need for a rule which would require compliance with the fire protection plan described in the FSAR. Such a rule could be a means for elimination of present license conditions and technical specifications.

For the plants remaining to be licensed the staff proposes to require that the fire protection program be submitted as part of the FSAR. Changes under 10 CFR 50.59 would then be allowed under the groundrules discussed above. No license condition would then be required.

Interpretations Document

The Steering Committee carefully reviewed the "Interpretations" and concluded that they will provide an improved means of achieving compliance with Appendix R. Concurrence with this position was received from the Regional Administrators and there were no substantive comments on this document received from the public. The Appendix R Questions and Answers include the questions posed by the industry and are supplemented with additional questions identified at the regional workshops. These responses may be used as guidance for design, review, and inspection activities. Minor revisions have been made in consideration of public comments and for consistency with the "Interpretations" document.

Trubatch Comments

The Commission also requested that the staff comment on the OGC memorandum and the differing professional opinions. Mr. Trubatch raises objections to five parts of the Interpretations document: fire boundaries, cold shutdown, automatic detection and suppression, fire damage, and alternate shutdown. A response to Mr. Trubatch's legal concerns has been prepared by OELD (Enclosure 8).

Two comments from Mr. Trubatch relate to the staff's handling of fire damage and alternate or dedicated shutdown. The staff has not changed its position regarding the need for licensees to consider the effect of suppressants when assuring that "the structure, system, or component under consideration is capable of performing its intended function during and after the postulated fire, as needed." The purpose of this interpretation of fire damage is to clarify that cosmetic damage, which does not interfere with the above capabilities, would not be a basis for rejection of an exemption request.

The position of the staff has also not changed in regard to the need for adequate separation of alternative shutdown equipment from normal shutdown equipment. However, Appendix R, in mentioning "room, or zone" in addition to "area," clearly implies that compliance may be achieved by other than separation by fire areas. The staff has recognized this and has granted exemptions in the past. What is changing is the recognition that compliance with Appendix R can be established with adequate justification and exemptions need not be requested. The "room" concept must be justified by preparation of a detailed fire hazards analysis that demonstrates that a single fire will not disable both normal shutdown equipment and the alternate shutdown capability.

Staff DPO

The staff DPO is primarily concerned with Section 4, Fire Area Boundaries, and Section 5, Automatic Detection and Suppression, of the Interpretations of Appendix R. The Interpretations allow penetrations in fire area boundaries and partial area coverage for fire suppression and detection if it can be established by analysis that adequate protection is provided for the fire hazards associated with the area. Such analyses have previously been approved by the staff as exemptions.

By contrast, the "Interpretations" do not require submission of fire hazards analyses for staff review or the filing of exemption requests prior to fire protection inspections; but the analysis must be available for NRC audit. The DPO states that not requiring exemption requests is in conflict with Generic Letter 83-33 which was issued previously to clarify staff positions on these and other issues, and which is deemed preferable.

The Steering Committee has reviewed the positions defined in the "Interpretations" and has concluded that they are technically and legally consistent with the requirements of Appendix R. It is expected that the DPO will be resolved accordingly. However, formal resolution of the DPO is being deferred pending Commission action on the recommendations of the Steering Committee.

Summary and Conclusions: The Steering Committee on Fire Protection Policy established by the EDO has made a number of recommendations for improving the consistency of the levels of fire protection safety and for enhancing the implementation of Appendix R. These recommendations, having received public comment, have been incorporated in a generic letter with attachments which the staff proposes to send to the licensees. The staff believes that the recommendations, with changes discussed above, will provide the most consistent and workable means of enhancing the implementation of Appendix R and intends to proceed expeditiously with their issuance.

Recommendations: That the Commission direct the staff to:

1. Issue the generic letter with attachments (Enclosures 4, 5 and 7 to this paper).
2. Conduct fire protection inspections in accordance with currently allocated fire protection resources and as described in Section B of the generic letter.

3. Utilize the guidance in Enclosure 7 as the criteria for enforcement of Appendix R requirements and proceed to evaluate and issue pending enforcement cases in accordance with this guidance.

4. Remove the fire protection license condition from future licenses if the fire protection plan is incorporated in the FSAR.

5. Evaluate the appropriate approach and need for fire protection Technical Specifications in conjunction with the ongoing effort on Technical Specification improvements.

William J. Dircks
Executive Director for Operations

Enclosures:
1. Memo dtd 10/26/84 to Dircks fm Fire Protection Policy Steering Committee
2. Memo dtd 5/3/85 to Denton fm Vollmer
3. Generic Ltr on Fire Protection
4. Interpretations of Appendix R
5. Appendix R Questions & Answers
6. Fire Protection License Condition
7. Guidance for Enforcement Actions Concerning Fire Protection Requirements
8. Memo dtd 6/27/84 to Vollmer fm Olmstead
9. Steering Committee Resolution of Public Comments

Commissioners' comments should be provided directly to the Office of the Secretary by c.o.b. Friday, October 4, 1985.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT Friday, September 27, 1985, with an information copy to the Office of the Secretary. If the paper is of such a nature that it requires additional time for analytical review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

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UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

[illegible]

ENCLOSURE 8

TERA ☐ Yes ☐ No

OELD S/F:
Index #________
Title of file________

JUN 27 1984

MEMORANDUM FOR:	Richard H. Vollmer, Director Division of Engineering Office of Nuclear Reactor Regulation
FROM:	William J. Olmstead Director and Chief Counsel Regulations Division Office of the Executive Legal Director
SUBJECT:	FIRE PROTECTION - RESPONSE TO TRUBATCH MEMO ON APPENDIX R GUIDANCE

In a June 8, 1984 Memorandum from S. Chilk to the EDO, the Commission requested staff comment on a Memorandum from Sheldon Trubatch to the Commissioners' assistants dated May 29, 1984. Many of the points which should be made in response to the memo are of a technical/policy nature, and are therefore appropriate for NRR response. We have responded to the legal points made in the memo. However, you may wish to add other points or suggest alternative positions. You can incorporate this response as appropriate into the SECY paper requested by the Commission as a result of the May 30 Commission meeting.

The Interpretation of Appendix R

a. Fire Boundaries

Mr. Trubatch's point appears to be that the "Interpretation" allows use of fire area boundaries with nonuniform ratings, and that this is directly contrary to the Commission's intent in promulgating Appendix R. He argues that this acceptance of nonuniform boundaries "would substantially undo much of what the Commission wanted to accomplish by promulgating Appendix R."

Mr. Trubatch is apparently not aware that the staff has been accepting fire barriers, including barriers which form the boundary between two fire areas, which have a nonuniform fire rating and may be rated at considerably less than three hours. This acceptance has been based upon low fire loads and the presence of compensating fire protection features such as detection and suppression. The Commission was fully informed of this in SECY-83-269, dated July 5, 1983. Prior to development of the "Interpretations" document, an exemption from Appendix R was required for each instance where a fire area boundary deviated from the complete, 3-hour barrier concept (except for fire areas specifically approved during the Appendix A review). Since Appendix R does not define "fire area," however, the "Interpretation" takes the position that a licensee can achieve compliance with the rule in this regard provided proceeds on an area-by-area basis for each plant. In an area where III.G.2 is being met, the 72-hour repair criterion applies. In an area alternative shutdown is being provided in lieu of meeting III.G.2, the 72-hour cold shutdown criterion applies. In any event there is little, if any, safety distinction to be made between having the capability to achieve cold shutdown within 72 hours and having the capability, at the end of 72 hours, to proceed to cold shutdown. In either case the plant has safely ridden through a major fire and cold shutdown can be achieved when it is prudent to do so. In a number of cases, the staff has granted exemptions to the III.L criterion where it is clear that this figure, which is admittedly nominal, does not sensibly apply to the circumstances at the plant. The rationale for these exemptions was also discussed in SECY-83-269.

Mr. Trubatch's remarks that the above reading of III.G and III.L might require further notice and comment fail to account for the language of the rule itself, language in the proposed and final rules, and the exemptions noted above. The clear difference in language in the final rule has already been noted. In the proposed version of Appendix R, Section III.G did not contain a "72-hour" provision provision. Section III.L.1 stated:

> ...the shutdown capability provided for each (critical) area shall be able to achieve and maintain subcritical reactivity conditions in the reactor, maintain reactor coolant inventory, achieve and maintain hot standby conditions...for at least 72 hours, achieve cold shutdown conditions within 72 hours and maintain cold shutdown conditions thereafter.

This language is essentially identical to existing Section III.L. Section III.L.3 of the proposed rule, however, stated:

> ...the equipment and systems comprising that means of hot standby or hot shutdown condition shall be capable of maintaining such conditions for at least 72 hours if the equipment required to achieve and maintain cold shutdown is not available because of fire damage. (emphasis added)

The underscored language expressly contemplates that under some plant conditions, cold shutdown may not be attainable within 72 hours. In the final rule, this provision was reworded substantially and moved to Section III.G. It was therefore subject to public comment, and the position taken in the "Interpretation" is consistent with both the proposed and final rules. Finally, since the staff has granted exemptions even from the more restrictive Section III.L requirement, and these exemptions have been published in the Federal Register, the interpretation that "cold shutdown within 72 hours" is not an absolute minimum level of protection under Appendix R has been a matter of public record. Indeed, to take a contrary

QUESTION 10: Attachment 3

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

October 24, 1985

MEMORANDUM FOR: Nunzio J. Palladino, Chairman
Thomas M. Roberts
James K. Asselstine
Frederick M. Bernthal
Lando W. Zech, Jr.

FROM: Martin G. Malsch
Deputy General Counsel

SUBJECT: STAFF INTERPRETATIONS OF APPENDIX R

On May 29, 1984, Sheldon Trubatch, then of the Office of the General Counsel, sent the Commissioners' technical assistants a memorandum (hereinafter the "May 1984 Memorandum," or, the "Memorandum") in which he presented his personal view that eight of the staff's then proposed interpretations of 10 C.F.R. Part 50, Appendix R might constitute significant changes in the rules and therefore require notice and comment rulemaking. May 1984 Memorandum at 1. Of the eight, five were among the more or less formal "Interpretations" the staff was then proposing and were considered by Mr. Trubatch to substantially modify some sections of Appendix R. Id. The other three of the eight interpretations were made by the staff in the course of answering licensees' questions, and were considered by Mr. Trubatch to raise minor issues.

On June 8, 1984, in a Memorandum from Samuel Chilk to William Dircks, the Commission requested that the staff comment on the May 1984 Memorandum. SECY-85-306 and Enclosure 8 thereto, submitted by the staff to the Commission on September 17, 1985, contain the staff's comments on five of the eight interpretations discussed by Mr. Trubatch, the five he had argued constituted significant changes in the rules. OELD prepared the staff's comments on three of the five, concluding that only those three raised legal issues. See SECY-85-306, Enclosure 8 at 1.[1]

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[1] The Nuclear Utility Fire Protection Group (NUFPG) also

[Footnote Continued]

Contact:
Steven Crockett, OGC
X41465

We conclude, based on the attached detailed legal anlaysis, that only one minor aspect of one of the five major interpretations cannot be squared with the rules. Specifically, we believe that the proposed interpretation on fire area boundaries should be modified to make clear that any fire barrier cable penetration identified as an open SER item at the time Appendix R became effective must be sealed to provide fire resistance equal to that required of the barrier the cable penetrates, and that any variation from this requirement requires an exemption. The staff has agreed to modify the proposed interpretation and has provided text for the modification, which is included in the attached analysis.

In one other area, where we support one of the staff's proposed interpretations, we do so with arguments which nonetheless lead us to recommend that the interpretation be clarified because it obscures either the intent behind the rule interpreted or some other rule. Specifically we recommend that the proposed interpretation of the phrase "fire damage" should be modified to make clear that the functional definition of "fire damage" which the staff proposes does not relieve the licensee of the duty to protect hot shutdown equipment against damage by fire suppression activity. The staff has expressed its willingness to modify the interpretation.

One final aspect of the interpretation on fire boundaries, which makes it possible for a licensee to erect a fire barrier with unsealed openings without having to apply for an exemption, causes us concern. Nonetheless, we conclude that our legal concerns could be overcome by a strong technical argument that unsealed openings do not generally pose fire hazards and need not be treated as stringently as fire barrier cable penetration seals and fire doors are treated by the rules.

[Footnote Continued]

responded to the May 1984 Memorandum. Apparently, despite the fact that the Memorandum was advice meant solely for the Commissioners' technical assistants, the NUFPG obtained access to the Memorandum. On September 6, 1984, the NUFPG sent Chairman Palladino a detailed reply to the issues raised by the Memorandum. On October 9, 1984, the author of the Memorandum, Mr. Trubatch, replied to the NUFPG. We have found nothing in the exchange between the NUFPG and Mr. Trubatch which would cause us to alter our analysis.

In general, we pay somewhat more attention to the history of the rules in question, and their relation to other rules in Appendix R, than do either the Memorandum or the staff's replies to it, and in some instances we are led by that history to conclude that the staff may sometimes have implemented Appendix R with a stringency not supported by the intentions with which the Appendix was first promulgated.

We have had the benefit of comments from the staff and OPE on the attached analysis, and in the light of those comments, we have corrected some things in the analysis and clarified others.

We understand that the Nuclear Utility Fire Protection Group was to have addressed the Commission on this matter this week. We are prepared to evaluate any additional questions of interpretation of Appendix R which they may eventually present, as well as their concern regarding the possible official Commission action on the staff's interpretations, should the Commission so request.

Attachment: Analysis

cc: OPE
EDO
NRR
IE
ELD

ANALYSIS

The Five Major Interpretations

A. Fire Area Boundaries

We agree in some respects with the May 1984 Memorandum's conclusion that the staff's proposed interpretation on fire area boundaries is contrary to the intent with which the Commission promulgated the pertinent rules. However, because we reach this conclusion by a route not taken by the May 1984 Memorandum, we are able to suggest a narrowing of the scope of the proposed interpretation such that once narrowed, the interpretation would both partly satisfy the staff's aim in proposing the interpretation and more nearly conform to the intention behind the pertinent rules than either the interpretation or current practice do. The staff has informed us that it is willing to make the narrowing we suggest. Included below is wording the staff proposes to add to the interpretation in order to narrow its scope.

Section III.G.2 of Appendix R requires that in some circumstances fire barriers of various ratings -- 3 hours in one set of circumstances and 1 hour in another -- be used to ensure that where the redundant trains of systems required for hot shutdown are located in the same fire area outside of containment, one of the redundant trains would be free of fire damage in the event of a fire. The staff's proposed interpretation of this section says that the section can be met even where the barrier is not completely sealed, floor-to-ceiling, wall-to-wall, and all penetrations in it sealed in such a way as to provide the same fire resistance the barrier provides. In the past, any licensee wanting to install a barrier which was not completely sealed, or which did not have the same fire resistance, or "rating," at every point of its surface -- that is, was not "uniform" -- had to apply for an exemption from the requirements of section III.G.2. The proposed interpretation says, however, that in such cases, the licensee need not any longer apply for an exemption (id., Enclosure 8 at 2); instead, the licensee must perform an evaluation of the adequacy of the boundary and retain the evaluation for later NRC audit. Id., Enclosure 4, at 2.

The May 1984 Memorandum argues that, since Appendix R was promulgated to prevent another fire like the one at Brown's Ferry, a fire which clearly illustrated the consequences of having non-uniform barriers, the staff's proposed interpretation, by treating non-uniform or incompletely sealed barriers as possibly being in compliance with Appendix R, "directly contradict[s] the Commission's intent in promulgating Appendix R." May 1984 Memorandum at 2. The Memorandum also claims that, because the proposed interpretation does not provide for NRC review of non-uniform and incompletely sealed barriers before they are installed, the interpretation permits delay and inconsistency in the implementation of Appendix R. Id. at 2-3.

In reply, the staff (OELD) and the proposed interpretation itself put great store by the fact that Appendix R nowhere defines the word "area" in the phrase "fire area." See SECY-85-306, Enclosure 8, at 1-2. The staff's argument seems to be that the fire barriers spoken of in Appendix R by definition separate fire "areas," and that were it the intent of Appendix R to require that fire barriers be floor-to-ceiling, wall-to-wall, and everywhere fire-resistant to the same degree, the word "area" would be defined in such a way as to make those requirements clear.

Nothing in Appendix R suggests that every fire barrier is a boundary of some fire area, and every area delimited by fire barriers.[1] On the other hand, nothing in Appendix R standing alone says that fire barriers must be uniform and completely sealed.

However, the history of Appendix R provides a better measure of the soundness of the proposed interpretation than does the lack of definition of some of the terms in the Appendix. The history of Appendix R clearly shows that, with one important exception, fire barriers need not be uniform.

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[1] Indeed, there seems to be a paradoxical logic in linking "barrier" and "area" too closely: if every barrier is a boundary of some fire area, then if two redundant trains of hot shutdown systems located in the same fire area and insufficiently separated by horizontal distance are separated by a fire barrier, the redundant trains are no longer in the same fire area since the barrier separating them puts them in different fire areas. But then they are not required to be separated by a barrier, for the requirement that they be separated by a barrier applies only if they are in the same area. Under this reading, section III.G.2.a and c would be without any practical force.

Section M of the proposed rule contained this paragraph:

> Penetrations in these fire barriers, including conduits, cable trays, and piping, shall be sealed or closed to provide fire resistance rating equivalent to that required of the barrier. Door openings shall be protected with doors, frames, and hardware that have been tested and approved by a nationally recognized testing laboratory to have a fire resistance rating equivalent to that required of the barrier.

45 Fed. Reg. 36089, May 29, 1980 (emphases added).

Section M of the proposed rule required barriers with 3-hour ratings. In addition, Section N of the proposed rule imposed on fire barrier cable penetration seals a rather elaborate set of rules which amounted in large part to a requirement that the seals have the same fire rating as the rating required of the barriers through which the cables penetrated. Id., at 36089-90. The standards enunciated in these sections are the ones the May 1984 Memorandum argues section III.G.2 now embodies.

However, the final rule contains neither the paragraph quoted above nor any other part of section M of the proposed rule. The comment accompanying the final rule said:

> Other comments to the effect that the requirement [section M] was excessively restrictive with regard to fire barrier penetrations, including fire doors and their associated frames and hardware, and ventilation systems have been acted upon by the staff and the requirement, as it had affected these items, was deleted.

45 Fed. Reg. 76608, November 19, 1980.

Nonetheless, the final rule retains in simplified form the requirement in section N of the proposed rule that fire barrier cable penetration seals have the same fire ratings as the ratings required of the the fire barriers in which they are installed:

> The acceptance criteria for the test [used to rate fire barriers] shall include: 1. The cable fire barrier penetration seal has withstood the fire endurance test without passage of flame or ignition of cables on the unexposed side for a period of time equivalent to the fire resistance rating required of the barrier. . .

Appendix R, section III.M. The comments accompanying the retained section unequivocally restate the requirement for uniformity: "These [fire barrier cable] penetrations must be sealed to achieve a degree of fire resistance equivalent to that required of the barrier that is pierced." 45 Fed. Reg. at 76608. The retention of this requirement in the final rule is evidence of the Commission's special concern that a rule of uniformity, rather than a more flexible rule of reason, be observed for cable penetrations. The degree of the Commission's concern may well have been a result of the fact that the fire at Brown's Ferry started at a point where cables penetrated a barrier.

Thus, the staff's proposed interpretation, insofar as it treats properly evaluated non-uniformities other than those where cables penetrate barriers as being in compliance with the Appendix R, accords with the Commission's intent in promulgating the requirements for fire barriers. Indeed, it appears that the staff has had no strong legal basis for requiring exemption for non-uniformities other than those where cables penetrate barriers.

However, standing alone, the staff's proposed interpretation, by the generality of its language, appears to include non-uniform cable penetration seals in the class of non-uniformities which might be treated as complying with the Appendix. The proposed interpretation thereby appears not only to run counter to the intention of Section III.M of the final rule, but also to the explicit meaning of the text of that section. To make clear that uniformity as specified in sec. III.M is still the rule for cable penetration seals and that a licensee wanting to deviate from the rule must apply for an exemption, the staff proposes to insert the following sentence between the last two sentences of the interpretation: "However, if certain cable penetrations were identified as open SER items at the time Appendix R became effective, section III.M of the rule applies (see 10 C.F.R. 50.48 (b)), and any variation from the requirements of section III.M requires an exemption."

The interpretation presents a difficult interpretive question in one other respect. As the interpretation now stands, it would leave open the possibility that an incompletely sealed barrier could be in compliance with Appendix R. Indeed, the principal aim of the interpretation is to leave open this possibility. In support of this interpretation staff could argue that when the final rule dispensed with what the accompanying comment called the "excessively restrictive" requirement for uniformity in barriers, the final rule also dispensed with the requirement in the proposed rule that the barriers be completely sealed. Section M of the proposed rule had said that "Penetrations in these fire barriers . . . shall be sealed or closed to provide fire resistance rating equivalent to that required of the barrier." Nothing from this sentence appeared in the final rule. The staff could argue that had the Commission wanted to promulgate a requirement that barriers be completely sealed, the final rule could have simply dispensed with the phrase "to provide . . . rating equivalent . . . " in the quoted sentence and retained the clause with the words "shall be sealed" in it.

However, arguments can also be made to the contrary. First, all that can be concluded with certainty from the fact that the quoted sentence was not retained in the final rule is that penetrations need not necessarily be sealed to the rating of the surrounding barrier, not that penetrations need not be sealed. Second, although the final rule does not explicitly say that barriers must be completely sealed, such a requirement is a fair implication of the content and length of certain comments accompanying the final rule. "The best fire protection for redundant trains of safe shutdown systems is separation by unpierced fire barriers . . ." 45 Fed. Reg. at 76608. Virtually the same wording occurs later on the same page. The comment does allow for openings, but not, apparently, unsealed ones: "Even fire barriers with openings have successfully interrupted the progress of many fires provided the openings were properly protected by fire doors or other acceptable means." Id. (emphasis added) In context, the phrase "acceptable means" is likely to refer not simply to the absence of a fire hazard near an unsealed opening in a barrier, but rather to devices such as are mentioned by either the proposed rule or the final rule, e.g., fire door dampers and barrier penetration seals. See Id. at 36089; see also section III.M of Appendix R. Note also that in both the proposed rule and the final rule, one whole section is given over to describing means for assuring that fire doors are kept closed, thereby evidencing Commission concern about openings in barriers. See 45 Fed. Reg. at 36090; see also section III.N of Appendix R. As to length of comment, the technical comment given in justification of those parts of the final rule which are about barrier penetrations is longer than the technical comment given on any other subject in the final rule (understandably so, given how the Brown's Ferry fire started), and nowhere in that technical comment on barriers did the Commission suggest that barriers in compliance with the Appendix might have unsealed openings.

In the face of the evidence in the final rule comments, the Commission's concerns about barrier penetration, and the lack of an explicit allowance in the rule and comments for unsealed openings, the better legal argument concludes, we think, that the Commission's intent in promulgating Appendix R was to require that openings in fire barriers be sealed. The text could be modified accordingly to make it clear that although in some circumstances a non-uniform fire barrier may be in compliance with the Appendix, no barrier with an unsealed opening will be, and that a licensee wanting to install such a barrier must apply for an exemption.

However, the contrary argument, based on the deletion of the proposed rule language, is not totally lacking in legal merit. We believe that the relative weakness in the contrary argument incorporated into the interpretation could be substantially overcome by a strong technical argument that unsealed openings do not, as a general matter, necessarily pose fire hazards, and that there is nothing inconsistent, as a matter of safety, in allowing unsealed openings but enforcing stringent requirements on fire barrier cable penetration seals and fire doors.

B. Cold Shutdown

The staff's proposed interpretation of the time limits in Appendix R relating to cold shutdown equipment appears to us to be in accord with the text of the pertinent sections of Appendix R and the intention behind them. However, our reasoning differs some from staff's, and, we hope, clarifies the intent of the time limits.

Section III.L.5 of Appendix R requires that fire protection features be capable of limiting fire damage suffered by alternative or dedicated means for achieving cold shutdown so that such means can be repaired, using on-site resources, and cold shutdown "achieved within 72 hours." (Emphasis added.) The same 72-hour standard for the capability to achieve cold shutdown also appears in subsection 1 of the same section, III.L.

Section III.G.1.b, on the other hand, requires that fire protection features be capable of limiting fire damage suffered by normal means of achieving cold shutdown so that such means "can be repaired within 72 hours." (Emphasis added.) Again, the same 72-hour standard for the capability to repair within 72 hours also appears in the chart in section I (Roman numeral "1") of Appendix R, with the addition that, here too, repair is to be accomplished with on-site resources.

The staff's second major interpretation proposes that this distinction which the Appendix consistently makes between repair in 72 hours and achievement in 72 hours be taken at face value, and thus that Appendix R not be read to require that plants going to cold shutdown after a fire get there within 72 hours. SECY-85-306, Enclosure 4, at 1.

The May 1984 Memorandum claims that there is a "generally accepted view" that cold shutdown has to be achieved within 72 hours after a fire, and that the staff's literal reading, without any stated safety basis, divides reactors into two classes: a class of those which must be able to achieve cold shutdown within 72 hours, and a class of those which need only be able to repair cold shutdown equipment within 72 hours. May 1984 Memorandum at 3-4.

The staff answers first that it knows of no "generally accepted view" that cold shutdown has to be achieved within 72 hours. Indeed, the staff points out, it is recognized that the more stringent rule that alternate equipment be able to achieve cold shutdown within 72 hours has not sensibly applied in some areas of some plants, and that exemptions have therefore been granted in those instances. SECY-85-306, Enclosure 8, at 2-3.

The staff further argues that Appendix R itself makes the division to which the Memorandum objects, not, however (the staff adds by way of clarification), between plants, but between areas within the same plant, since a plant with alternate shutdown systems does not necessarily have an alternate system for every normal system in the plant.[2] Id., at 3.

"In any event," the staff says, "there is little, if any, safety distinction to be made between having the capability to achieve cold shutdown within 72 hours and having the capability, at the end of 72 hours, to proceed to cold shutdown." Id.

The distinction between the capability to repair in 72 hours and the capability to achieve cold shutdown in 72 hours is distinctly stated in Appendix R. Section III.L speaks consistently of repairing alternate systems and achieving cold shutdown within 72 hours, while section III.G. speaks consistently of simply repairing normal cold shutdown systems within 72 hours. The May 1984 Memorandum is correct in asserting that the Commission, in the face of industry opposition, retained in the final rule the proposed rule's time limits relating to cold shutdown equipment. However, what the Commission retained was not, as the Memorandum seems to think, a single rule applicable to both normal and alternative systems. The proposed rule's requirement that equipment be able to achieve cold shutdown within 72 hours applied only to alternate cold shutdown systems. The proposed rule stated no time requirement applicable to normal cold shutdown systems. See sections III.G. and III.L of the proposed rule, 45 Fed. Reg. at 36089.

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[2] Moreover, we are informed that nearly every, if not every, plant to which Appendix R applies has at least one alternate system in some area of the plant.

Thus, from the start, the Commission apparently intended to distinguish between the fire protection to be given normal cold shutdown systems, and the fire protection to be given alternative systems. Therefore, in reasserting the final form of this distinction, namely the apparently distinct requirements in the final rule, the proposed interpretation does not contradict the Commission's intention in promulgating Appendix R.

Indeed, if one insists that the Commission intended there to be a single requirement applicable to both normal and alternative shutdown systems, then it must be noted that there is good evidence that the Commission intended that single requirement to be the less stringent one that fire protection for cold shutdown systems ensure that they could be repaired within 72 hours. First, as the staff points out, the proposed rule also required that hot shutdown equipment be able to maintain hot shutdown for 72 hours after a fire, and thus acknowledged that cold shutdown equipment might not be available until 72 hours after a fire. See sections III.L.1 and III.L.3 of the proposed rule, 45 Fed. Reg. at 36089.

Second, the final rule contains an analogous requirement whose open-endedness suggests that all the time limits stated for cold shutdown are merely strong suggestions, and that in every case what actually applies is the rule of reason, "Achieve cold shutdown when you can":

> If the capability to achieve and maintain cold shutdown will not be available because of fire damage, the equipment and systems comprising the means to achieve and maintain the hot standby or hot shutdown condition shall be capable of maintaining such conditions until cold shutdown can be achieved.

Appendix R, sec. III.L.4.

Last, the final version of the supposedly more stringent rule, that alternative equipment be able to achieve cold shutdown within 72 hours, is paraphrased thus in a comment accompanying the final rule: "Fire damage to cold shutdown capability is limited to damage that can be repaired within 72 hours to provide a margin in achieving cold shutdown." 45 Fed. Reg. at 76607 (emphasis added).

Given the strength of the argument that the Commission intended to promulgate two 72-hour standards, it is not necessary to answer the criticism in the May 1984 Memorandum that the staff's proposed interpretation proffers no safety basis for the distinction between the two standards. See May 1984 Memorandum at 4. The interpretation is not obliged to provide a technical justification for its adherence to standards in effect for over five years.

However, some of the staff's remarks in reply to the Memorandum may have obscured the safety basis for the distinction between the two standards. The staff tries to turn the Memorandum's criticism into a defense of the proposed interpretation by asserting that "there is little, if any, safety distinction to be made" between the two standards. SECY-85-306, Enclosure 8, at 3. The staff here appears to be putting forward a backup argument, which roughly paraphrased, is that "even if it was not the intention of the Commission to promulgate two 72-hour standards, the staff is not now proposing a significantly new rule, for there is little difference between the two 72-hour standards." But if there is little, if any, difference between them, then it seems odd to propose an interpretation the main purpose of which is to assert a difference.

Therefore, rather than have the proposed interpretation appear to be without technical justification, we note briefly what we are given to understand the technical justification to be: there is indeed little safety difference between achieving cold shutdown by the 72-hour mark and starting at the 72-hour mark to go to cold shutdown with equipment which has been repaired by that time. However, there is a significant safety difference between the level of fire protection given equipment which must be able to achieve cold shutdown within 72 hours and the level of fire protection given equipment which need only be repaired within 72 hours.

Therefore, Appendix R aims for certain levels of fire protection, not time limits on certain phases of operation. It is the essential aim of Appendix R to require that a system be given fire protection appropriate to its safety functions. Thus the Appendix first establishes a minimum level of fire protection for normal cold shutdown equipment. The level is appropriate because it "provide[s] a margin in achieving cold shutdown conditions." See 45 Fed. Reg. at 76607. However, the Appendix then establishes a higher level of protection for the alternative system, for it is the system of last resort. The levels are, to be sure, expressed in terms of time, but the terms are not limits on operation; they are, instead, more like the time ratings on fire boundaries, which are measures of the level of fire protection.

C. Fire Damage

We here recommend that the staff's proposed interpretation on fire damage be modified in much the way in which the May 1984 Memorandum would like it to be modified. However, we do not agree with the Memorandum's claim that the interpretation significantly changes anything in Appendix R. Rather we recommend modification because the scope of the phrase "fire damage" in the interpretation could be misunderstood and a related subsection of the Appendix, one which deals with damage by fire suppression, thereby obscured.

Sections III.G.1 and 2 of Appendix R require that fire protection assure that particular features of shutdown systems be "free of fire damage." The staff's proposed interpretation assigns a functional meaning to the phrase "free of fire damage:" "that is, the structure, system or component under consideration is capable of performing its intended function during and after the postulated fire, as needed." SECY-85-306, Enclosure 4, at 1-2.

The Memorandum argues that the proposed interpretation does not share the Commission's concern in promulgating Appendix R that shutdown systems not be disabled by fire suppression agents. The Memorandum apparently construes the phrase "fire damage" liberally to mean any fire-related damage, including damage from fire suppression, but is concerned that licensees will construe the phrase more literally to mean only "damage by fire" and conclude that they are under no further obligation once they have shown that the redundant shutdown systems will be free of disabling damage by fire. The Memorandum recommends that the interpretation be modified to explicitly require that the shutdown systems not be disabled by fire suppression agents. May 1984 Memorandum at 5.

The staff (EDO) agrees that shutdown systems are not to be disabled by fire suppression, and claims that its proposed interpretation intends only to make it clear that the lack of protection against purely cosmetic damage would not justify rejecting a request for an exemption. SECY-85-306 at 8.

The reply could have noted that Appendix R, in section III.G.3, clearly requires consideration of damage from fire suppression systems. The section mandates alternative shutdown systems first where the licensee cannot meet section III.G.2's requirement that protection of redundant trains of hot shutdown systems ensure that at least one of the trains will be free of fire damage, or, second, where these trains may be subject to damage from fire suppression systems. The staff's proposed interpretation does nothing to remove this section, and thus the phrase "fire damage" can be construed literally without relieving licensees of an obligation to protect against damage from fire suppression.

Indeed, unless the phrase is construed literally, part of section III.G.3 will be pointless. If "fire damage" means any fire-related damage, the second part of section III.G.3, the part which requires an alternative system where redundant trains could be damaged by fire suppression systems, is redundant, for that part of section III.G.3 assumes that it is possible to meet section III.G.2's requirement that at least one redundant train of hot shutdown equipment be "free of fire damage" and yet still face a risk of damage from fire suppression systems. (If the requirement in III.G.2 is not met, the first part of section III.G.3 applies.) But if "fire damage" includes any fire-related damage, then the situation assumed by the second part of section III.G.3 could never arise, and there would be no need for that part.

The interpretation's functional definition of fire damage could be read to make the second part of section III.G.3 seem pointless, for the standard is worded generally enough to permit the conclusion that it applies to damage from any fire-related source, including fire suppression systems. Thus, insofar as it purports to be a definition of the phrase "fire damage," it appears to attribute the same generality to the phrase. For the sake of clarity the staff's proposed interpretation might be modified to say that the functional standard of damage applies both to damage by fire and damage by fire suppression, and that the two kinds of damage are discussed in sections III.G.2 and III.G.3, respectively.

We are told that the interpretation is a response to the industry's having asked the staff to say what it meant by "damage by fire." Given this context for the interpretation, it can be argued that there is no need to make the clarifying changes we are recommending. However, as the very existence of the Memorandum's criticism of the interpretation shows, it will be read and seriously weighed by some who are not as aware of the context of the interpretation as some parts of the industry and staff are. Clarification of the interpretation could help prevent further misunderstanding.

D. Automatic Fire Detection and Suppression

Sections III.G.2.b and c of Appendix R require that in certain circumstances, hot shutdown capability be protected by fire detectors and automatic fire suppression equipment "installed in the fire area." Other provisions of Appendix R also speak of such equipment as "installed in the fire area." The staff's fifth proposed interpretation says that "detection and suppression providing less than full area coverage may be adequate to comply with the regulation." SECY-85-306, Enclosure 4, at 2. The staff has been in the practice of requiring an exemption process for less than full area coverage, but the proposed interpretation would require only that the licensee perform for later NRC audit an evaluation of the adequacy of the partial coverage the licensee wanted to install.

The May 1984 Memorandum recommends that the staff continue its practice of requiring exemptions for partial coverage. As with the proposed interpretation on fire boundaries, the Memorandum argues that the prior NRC review afforded by the exemption process reduces inconsistency in the implementation of Appendix R and prevents the cost and delay entailed whenever something found inadequate in an NRC audit after installation has to be replaced. May 1984 Memorandum at 5.

The staff (OELD) first notes that the sections under consideration say only "installed in the area," not something like "throughout the area." See SECY-85-306, Enclosure 8, at 3. The staff then applies one of the arguments it applied to the Memorandum's comments on the proposed interpretation on fire boundaries: Exemptions from full area coverage have been granted wherever partial coverage provided protection equivalent to full coverage; future instances of partial coverage, though not subjected as a matter of course to NRC review before installation, will meet the same standard of equivalence. Id.

The history of the rule on uniformity of fire boundaries made it clear that the exemption process was not clearly justified by the intention behind the rule. However, the history of the rule on coverage by automatic detection and suppression equipment is not similarly helpful. We are left with only the language of the final rule, and agree that the word "in" is versatile enough to mean something other than "throughout."

E. Independence of Alternative or Dedicated Shutdown

Section III.G.3 of Appendix R provides that whenever alternative or dedicated shutdown systems are required, they shall be "independent of cables, systems or components in the area, room, or zone under consideration," that is, the alternative or dedicated system must be outside the area, room, or zone in which the normal system is located. The staff's proposed interpretation of the quoted language would allow alternate systems to be located in the same area in which the normal system to which they are the alternative is located, as long as the alternate systems were independent of the room or zone in which the normal system was located. SECY-85-306, Enclosure 4, at 3.

The May 1984 Memorandum argues that this interpretation lowers the standard which has been applied in the past, provides no guidance for determining the acceptability of alternate or dedicated systems located in the same area in which the normal system is located, and rewards those licensees who have delayed their compliance with the higher standard. The Memorandum also reports that some members of the fire protection staff recommend that at the very least a licensee proposing to locate alternate and normal systems in the same area be required to undertake a detailed fire hazards analysis justifying the proposal. May 1984 Memorandum at 5-6.

The current version of the proposed interpretation adopts the recommendation of those members of the fire protection staff. See SECY-85-306, Enclosure 4, at 3. Beyond this, the staff (EDO) argues that sec. III.G.3, by saying "room or zone" after "area," "clearly implies that compliance may be achieved by other than separation by fire areas." SECY-85-306, at 8.

It does appear that the intention behind the rule was to permit justifiable presence in the same area of both alternate and normal systems. The proposed version of III.G. said that the alternate capability had to be "independent of the fire area" in which the normal system was located, but made no mention of "room" or "zone." See 45 Fed. Reg. 36087. These latter two words were added in the final version of sec. III.G., and although the comments accompanying the final version of sec. III.G. do not specifically mention the two words, the comments do say that the wording of the section has been revised "to provide clarification." See 45 Fed. Reg. at 76606. We do not see how the Commission could have thought that the addition of "room" or "zone" was clarifying unless the Commission intended the addition to convey the possibility that independence of "room" or "zone," but not of "area," might satisfy the rule.

We note that, as with the proposed interpretation on fire boundaries, the staff, by the practice of requiring exemptions in certain cases, has been construing the rule to be more stringent than it was intended to be. The proposed interpretation appears to revert to the intention behind the rule.

The Minor Interpretations

Even though the staff made no formal response to what the May 1984 Memorandum identifies as minor issues raised by three interpretations the staff makes in the Questions and Answers (see SECY-85-306, Enclosure 5), the staff has been helpful in answering our questions about these interpretations, and we have thus been able to come to some conclusion about each of them.

1. Seismic Qualification of Oil Collection Systems

Section III.O of Appendix R requires, among other things, that the oil collection systems, which drain off oil leaked from the lube systems for reactor coolant pumps, be designed to provide reasonable assurance that the collection systems will withstand a Safe Shutdown Earthquake (SSE). Section 6.1 of the Questions and Answers says that a basis for an exemption from this requirement would be that the lube oil system was itself designed to withstand the SSE. See SECY-85-306, Enclosure 5, at 26. The reasoning behind an exemption on such a basis would be that if the lube oil system could withstand an SSE, no oil would leak during an SSE, and thus the oil collection system would not be needed during an SSE.

The 1984 Memorandum is concerned that oil leaked before an SSE might accumulate in the collection system and present a fire hazard if the collection system were to break up during an SSE. The Memorandum therefore recommends that any analysis performed to justify an exemption from section III.O consider whether oil accumulated in the collection system could present a fire hazard in an SSE.

The Memorandum's comments on this section of the Questions and Answers raises no legal issues. The staff is not arguing in that section that section III.O does not require that oil collection systems be seismically qualified. Strictly speaking, the staff is not interpreting section III.O at all, but rather simply setting out one basis for an exemption request. The Memorandum seeks some assurance that an analysis done to determine whether an exemption from this rule should be granted would consider more than just whether the lube oil system was seismically qualified. It is, of course, reasonable to argue that, whatever the design of the lube oil system, the container to which the oil collection system drains the leaked oil (see Appendix R, sec. III.O) should be seismically qualified. However, the answer to which the Memorandum responds does not say that the staff would not consider factors other than the design of the lube oil system when deciding whether to grant an exemption from III.O. The answer at issue only lists a basis for a request, not a promise to grant any request made on such a basis.

Moreover, when in the role of commenting on the legal soundness of a staff position, we must assume that the staff will not breach its duty under 10 C.F.R. 50.12 to determine that exemptions will not endanger life or property or the common defense and security and are otherwise in the public interest. We therefore must assume that the staff, when passing on a request for an exemption from sec. III.O, will analyze the hazards associated with the oil collection system, including any hazards associated with the container linked to the system. We note that section 6.2 of the Questions and Answers evidences staff's awareness of the need to assure that such containers are designed to withstand design basis accidents.

2. Intervening Combustibles

One alternative to protecting redundant trains of hot shutdown systems by a one or three-hour barrier is separation of the redundant trains "by a horizontal distance of more than 20 feet with no intervening combustible or fire hazards." Appendix R, section III.G.2.b. We are informed that in the past, the staff has required that any licensee which planned to rely on separation rather than barriers, but also wanted to have some amount of intervening combustibles in the space between the redundant trains, had to apply for an exemption from the "no intervening combustible" requirement of sec. III.G.2.b, no matter how small the amount.

The staff now proposes, in secs. 3.6.1 and 3.6.2 of the Questions and Answers, that "no intervening combustible" means "no significant quantity of combustibles." The staff also proposes that a licensee's fire protection engineer make the initial judgment of whether a given quantity of intervening combustible is significant enough to require that the licensee apply for an exemption, and that if the engineer is concerned that the amount of combustibles may not be considered insignificant by an independent reviewer, an exemption is to be requested, or the staff consulted. An engineer's judgment that the quantity was insignificant would be subject to later audit by the NRC.

The May 1984 Memorandum argues that the presence of intervening combustibles in the separation between redundant trains of hot shutdown equipment lessens the effectiveness of horizontal separation. The Memorandum thus implies that the staff should continue to rely on the exemption process, rather than licensees' fire protection engineers, to determine whether a given set of circumstances renders intervening combustibles harmless.

The Memorandum relies on the apparent absence of any qualifier like "significant" in the rule, and if this reliance were clearly justified, we would have to conclude that the staff's interpretation of the phrase "no intervening combustible" was not consistent with the rule, for we have found nothing in the history of the rule to suggest that the absoluteness of the phrase is sometimes to be ignored in the implementation of the rule.

However, it can be argued that the phrase is not so unbending as it may appear. As we noted above, the whole of the pertinent phrase is "no intervening combustible or fire hazard." It could be argued that insignificant amounts of intervening combustible materials do not constitute a hazard and therefore may be permitted under the rule. The strength of this argument depends on whether the drafter of the whole phrase intended to write "no intervening combustibles and no intervening fire hazards," or "no combustible hazard and no fire hazard," -- that is, on whether "combustible" in the published phrase is a noun or an adjective. If "combustible" is a noun in the phrase, then the rule is, with unavoidable absoluteness, that there will be no amount, no matter how small, of intervening combustibles.

The history of the rule sheds no light on the syntax of the phrase. In the final rule, the word "combustible" is used clearly as a noun about as often as it is used clearly as an adjective. See, e.g., Appendix R, sec. III.K, subsecs. 1-3, 6, 8. In sec. 3.6.2 of the Questions and Answers, the staff uses it, self-defeatingly, as a noun.

In the absence of a decisive history and unambiguous syntax, what will decide this issue is the strength of the non-legal arguments that it is, technically speaking, possible to have insignificant amounts of combustible materials in the horizontal distance being relied on as fire protection, that a licensee's fire protection engineer can be relied on to judge whether a given amount of combustible material is insignificant, and that the requirement that the staff be brought in when the engineer thinks that an independent reviewer might disagree with his or her judgment is protection enough against the possibility of misjudgment by the engineer.

3. Oil in Closed Cans as an Intervening Combustible

The interpretation at issue here focuses on another word in the phrase "no intervening combustible." In sec. 3.6.3 of the Questions and Answers, the staff says that oil in closed cans which are in accordance with NFPA 30 is not to be considered an intervening combustible under sec. III.G.2.b, just discussed. The Memorandum says that, given that a fire near an oil-filled can could heat the oil enough to cause it to vaporize, burst the can, and then ignite, the staff should be asked why oil in closed cans need not be considered to be an intervening combustible.

The Memorandum's concern is not with the notion that a properly contained flammable material, such as electrical cable in a metal conduit, ought not to be considered an intervening combustible. Rather the Memorandum apparently does not think that oil can be contained so as not to be a fire hazard. However, we are informed that an oil container meeting code requirement NFPA 30 is vented so that it would not burst during any fire which, assuming an otherwise adequate fire protection program, could occur in the horizontal separation between redundant trains of hot shutdown equipment, and that flammable vapors escaping the vent would not significantly increase the threat caused by the exposure fire that is nearing the container. We therefore see no need to modify the interpretation.

UNITED STATES
NUCLEAR REGULATORY COMMISSION
W SHINGTON, D.C. 20555

OFFICE OF THE
SECRETARY

QUESTION 10: Attacnment 4

March 7, 1986

MEMORANDUM FOR: Victo Stello, Jr.
Actin xecutive Director for Operations

FROM: Samuel . Chilk, Secretary

SUBJECT: STAFF REQUIREMENTS - SECY-85-306/305B, "STAFF RECOMMENDATIONS REGARDING THE IMPLEMENTATION OF APPENDIX R TO 10 CFR 50"

The Commission, by a vote of 4-1, with Commissioner Asselstine dissenting, approves issuing the generic letter on fire protection, "Implementation of Fire Protection Requirements," with the following changes:

- The license condition should be consistent with the OGC memorandum of January 10, 1986.
- The "Interpretations of Appendix R" document should be made consistent with the OGC memorandum of October 24, 1985 ("Analysis", page 4 and page 11).
- Delete the second to the last sentence of the generic letter (SECY-85-306B) which reads: "If licensees fail to request amendments to their licenses to add this condition, the Commission will consider whether such changes should be required by order or by rule." This sentence is inappropriate when the amendments to add a license condition and delete the technical specifications are voluntary on a licensee's part.
- The staff should review the "Appendix R Questions and Answers" to ensure they reflect the changes recommended in SECY-85-306B. Question 8.2, in particular, was not updated to reflect the proposed use of a licensee condition.

Part 50.59 will take on more significance and importance as a result of the actions taken here. The staff should make certain that the licensees properly document changes in facilities and changes in procedures, as required.

The proposed Fire Protection Enforcement Guidelines in SECY-85-306B require an actual fire, concurrent with a failure of the fire protection requirements, to occur before either a Severity Level I or II violation could be imposed. Existing 10 CFR Part 2, Appendix C, severity categories applicable to operating reactors indicate that concurrent events of this nature are necessary only for Severity Level I categories. The Commission does not believe that the proposed enforcement policy should be more restrictive in this regard than the existing enforcement guidance. Consequently, the staff is directed to revise its proposed fire protection severity level guidelines so they are consistent with 10 CFR Part 2.

Commissioner Asselstine's concerns were included in his vote sheet which was previously distributed to you.

cc: Chairman Palladino
Commissioner Roberts
Commissioner Asselstine
Commissioner Bernthal
Commissioner Zech
OGC
OPE

QUESTION 11. In August 1984, the Executive Director for Operations formed the Fire Protection Policy Steering Committee (FPPSC).

(A) Specifically, what were the reasons for the formation of the FPPSC?

ANSWER.

The Executive Director for Operations formed the Fire Protection Policy Steering Committee to review current fire protection issues and make recommendations for resolution of these issues. All current licensing, inspection, and technical issues were to be examined and policy recommendations were to be developed to (1) expedite Appendix R compliance for older plants and (2) ensure consistent levels of fire protection safety at all plants. Among the issues to be considered were: adequacy of current guidance to industry; interpretation of Appendix R requirements; treatment of technical and schedule exemptions; comparison of plants licensed before the issuance of Appendix R (subject to the requirements of Appendix R) and those licensed and to be licensed since then; adequacy of current inspection practices; issues raised by certain staff fire protection engineers in their Differing Professional Opinion; and identification and resolution plan for any outstanding technical issues. The work was to be done within 2 months.

QUESTION 11. (continued) - 2 -

(B) What was the make up of the FPPSC?

ANSWER.

The FPPSC consisted of:

1. Director, Division of Engineering, Office of Nuclear Reactor Regulation (Chairman)
2. Director, Division of Engineering and Technical Programs, Region I
3. Director, Division of Reactor Safety, Region II
4. Director, Division of Reactor Safety, Region III
5. Director, Quality Assurance, Safeguards and Inspection Programs, Office of Inspection and Enforcement
6. Director and Chief Counsel, Regulations Division, Office of the Executive Legal Director

(C) What were the findings of the FPPSC?

ANSWER.

The FPPSC's principal recommendations were as follows:

1. Promptly issue a Generic Letter informing all licensees that:

    (a) Extensions to 10 CFR 50.48(c) schedules will no longer be granted except where a licensee has an approved "living schedule."

    (b) Inspections will include plants with uncompleted modifications as well as plants with completed modifications. In addition, licensees may request an inspection to help avoid costly design and implementation decisions with which the staff may disagree.

    (c) Documentation of valid analyses supporting fire protection features must be available for inspection.

    (d) Quality assurance measures should be in effect to ensure that fire protection systems will function as intended.

(e) NRC must be notified when deficiencies are discovered pursuant to 10 CFR 50.72 and 50.73.

(f) A standard fire protection license condition is available that will clarify licensees' options in making modifications to the fire protection program.

2. Issue the following guidance documents with the Generic Letter:

   (a) Interpretations of Appendix R
   (b) Appendix R Questions and Answers
   (c) Fire Protection License Condition

3. Adopt the proposed Guidance for Enforcement Actions Concerning Fire Protection Requirements.

QUESTION 11. (continued) - 5 -

(D) Did the NRC's fire protection engineers take part in the FPPSC either as members or participants?

ANSWER.

The fire protection engineers did not take part as members of the FPPSC. They were, however, invited to attend one meeting with the FPPSC in the summer of 1985. During this meeting, the FPPSC solicited their views regarding past difficulties in enforcing NRC fire protection criteria and other issues related to fire protection, including their recommendations for future action.

QUESTION 11. (continued) - 6 -

(E) Do the staff fire protection engineers feel their views were taken into account during the FPPSC's life? Explain fully.

ANSWER.

The engineers have indicated that they feel that the FPPSC was aware of their concerns, based on the meeting mentioned above and the documents issued in conjunction with their Differing Professional Opinion. As explained more fully in the response to Questions 12A, B, and C, the DPO was viewed as a mechanism to convey their views to upper level management. The formation of the FPPSC is evidence that this goal was achieved.

1/27/88 BREAUX Q11

QUESTION 12. In late 1985, the DPO filed by the staff fire protection engineers was "resolved."

(A) Specifically, what was the outcome of the DPO?

ANSWER.

In a memorandum to Harold Denton, dated November 27, 1985 (copy attached), Mr. Faust Rosa, Chief of the Electrical, Instrumentation and Control System Branch, recommended that no action be taken on the DPO. That is, the DPO was considered resolved in accordance with NRC Manual Appendix 4215, Section G.1.c.

The resolution was based on the following: (1) the DPO was concerned with NRC fire protection policy; (2) its resolution could come about only through a comprehensive review of this policy by an appropriate level of NRC management; and (3) such a review had been completed by the Fire Protection Policy Steering Committee. The FPPSC had concluded that the "Interpretations of Appendix R" document was technically and legally consistent with Appendix R. This, in effect, stated that the DPO failed to justify a modification of a management decision, policy position, or a proposed or existing agency practice.

Attachment:
11/27/85 Resolution of DPO
(See Question 10 for SECY-85-306 paper)

1/27/88 BREAUX Q12

QUESTION 12(A) Attachment
D. J. Kubicki

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

NOV 27 1985

MEMORANDUM FOR: Harold R. Denton, Director
Office of Nuclear Reactor Regulation

FROM: Faust Rosa, Chief
Electrical, Instrumentation & Control Systems Branch
Division of PWR Licensing A

SUBJECT: RECOMMENDED RESOLUTION OF THE DPO ON "INTERPRETATIONS OF APPENDIX R"

As requested by your memorandum of June 15, 1984, I have conducted an independent assessment of the subject differing professional opinion (DPO). The DPO was filed jointly by five staff fire protection engineers (R. Eberly, D. J. Kubicki, and J. F. Stang, Jr. of CMEB/NRR; and C. B. Ramsey and J. M. Ulie of RIII). The DPO concerns certain new interpretations of Appendix R which are considered by these staff members to be contrary to existing guidance and not conducive to timely or consistent resolution of Appendix R issues. Based on my assessment, I have concluded that the DPO fails to justify modification of a management decision, policy position, or a proposed or existing agency practice. Therefore, I recommend that no action need be taken, i.e., that the DPO be considered resolved in accordance with NRC Manual Appendix 4125, Section G.1.c. The basis for this conclusion is provided in the following paragraphs. Enclosure 1 provides a chronology of DPO documentation and a list of relevant reference documents.

The DPO, which was filed on May 2, 1984, takes issue with the proposed new "Interpretations of Appendix R" (Fire Protection Program for Nuclear Power Facilities Operating Prior To January 1, 1979). The proposed interpretations were developed by management level fire protection staff with input from IE, ELD and DEDROGR. A draft of the proposed interpretations was distributed to and discussed with utility representatives at the NRC Regional Workshops on Fire Protection held during the March-April 1984 time frame. At these workshops the draft was characterized as being tentative, with formal issuance at a later date being considered.

The staff DPO is primarily concerned with Section 4, Fire Area Boundaries, and Section 5, Automatic Detection and Suppression, of the Interpretations of Appendix R. The Interpretations allow penetrations in fire area boundaries and partial area coverage for fire suppression and detection if it can be established by analysis that adequate protection is provided for the fire hazards associated with the area. Such analyses have previously been approved by the staff as exemptions. Additionally, in contrast with prior practice, the "Interpretations" do not require submission of fire hazards analyses for staff review or the filing of exemption requests prior to fire protection inspections; but the analysis must be available for NRC audit. The DPO states that not requiring exemption requests is in conflict with Generic Letter 83-33 which was issued previously to clarify staff positions on these and other issues, and which is deemed preferable.

The issues raised by the DPO are not of a technical nature but relate to NRC fire protection policy. Therefore, a resolution could only come about as a result of a comprehensive review of this policy undertaken by an appropriate level of NRC management. Such a review has been performed by the Steering Committee on Fire Protection Policy which was convened for this purpose in September 1984. This committee, which was composed of individuals at the Division Director level of management, drew its membership from NRR, ELD, IE, and three of the Regions. The recommendations and the fire protection guidance package contained in the Steering Committee final report were incorporated in SECY-85-306 (Enclosure 2) which was submitted to the Commission by the EDO on September 17, 1985. Enclosure 2, in addition to the staff recommendations and the guidance package, includes discussions of all aspects of the fire protection issue including the DPO and, with its enclosures, documents the scope and depth of the policy and program review performed by the Steering Committee.

The "Interpretations of Appendix R" which are included in the guidance package do not differ significantly from the original version on which the DPO was based. The Steering Committee reviewed the positions defined in the "Interpretations" and concluded that they are technically and legally consistent with the requirements of Appendix R. Enclosure 2 includes a staff recommendation to the Commission to formally issue the "Interpretations."

In making my assessment of the DPO I have: (1) evaluated the DPO documentation and references listed in Enclosure 1, (2) met with the DPO originators and other senior staff members involved in fire protection to explore the technical, legal and procedural aspects of the issue, and (3) participated in the discussions of the DPO and related fire protection concerns in the meetings of the Steering Committee (as Chairman of its Working Group). I concur in the Steering Committee's conclusion that the positions defined in the "Interpretations" are technically and legally consistent with Appendix R. I further conclude that this issue has received the management review commensurate to its importance to safety. My recommendation for resolution of the DPO is based on this assessment.

A Commission meeting was held on October 3, 1985 to discuss the staff recommendations. At this meeting the Commission requested that the originators of the DPO provide a written summary statement of their position in view of the staff's recommendation in regard to the DPO. (It is noted that to date the Commission has not taken action on the staff recommendations.)

In a response to the Commission's request, Mr. Stang stated that the proposed resolution adequately satisfies his concerns raised in the DPO and that he considers the DPO resolved.

Mr. Ulie's response provided additional comments on the possible adverse effects of implementing the "Interpretations." He also indicated that the intent of his DPO was to make NRC management aware that the "Interpretations" represented a significant change in NRC policy and practice, and that this objective had been achieved. In a recent telephone conversation with me, Mr. Ulie confirmed that he now considers the DPO issue closed.

Mr. Ramsey's response provides detailed comments primarly expressing disagreement with the staff recommendations in the following areas: adequacy of current guidance to the industry, documentation required to demonstrate compliance, Interpretations of Appendix R, Appendix R Questions and Answers, QA requirements, and fire hazard analysis. Most of these comments extend beyond the scope of the original DPO. However, in my view, they do not change the basic character of the DPO which relates to matters of NRC fire protection policy. The Steering Committee review of fire protection policy encompassed the areas addressed by these additional comments. Therefore, I conclude that the resolution of the DPO on the basis described above remains valid.

Mr. Kubicki has not provided a written response to the Commission's request. However, in a recent conversation with me on this matter he indicated that his views as expressed in the DPO remain unchanged.

It should also be noted, as a matter of record, that Mr. Eberly has left the Commission for employment in the private sector. No further action is required by Manual Chapter 4125 in this case.

In summary, my resolution of the DPO is based on the premise that the DPO is primarily concerned with NRC fire protection policy and, therefore, its resolution could only come about through a comprehensive review of this policy by an appropriate level of NRC management. Such a review has been completed by the Steering Committee on Fire Protection Policy. The conclusion reached by the Steering Committee is that the "Interpretations of Appendix R" is technically and legally consistent with Appendix R. Based on this the staff has recommended to the Commission that the "Interpretations" be formally issued. This in effect, states, that the DPO fails to justify modification of a management decision, policy position, or a proposed or existing agency practice. Therefore, I recommend that no action need be taken, i.e., that the DPO be considered resolved in accordance with NRC Manual Appendix 4125, Section G.1.c.

Faust Rosa

Faust Rosa, Chief
Electrical, Instrumentation &
Control Systems Branch
Division of PWR Licensing A

Enclosures/cc: See next page

Enclosures:
1) Chronology of DPO Documentation and Listing of Relevant References
2) SECY-85-306, Staff Recommendations Regarding the Implementation of Appendix R to 10CFR50 dated September 17, 1985

cc: w/o Enclosure 2:
D. G. Eisenhut
T. E. Murley, RI
J. N. Grace, RII
J. G. Keppler, RIII
R. H. Vollmer
H. Thompson
W. V. Johnston
J. L. Funches
J. E. Lyons
V. Benaroya
R. L. Ferguson
W. M. Shields
T. V. Wambach

cc: w/Enclosures:
D. J. Kubicki
C. B. Ramsey, RIII
J. F. Stang, Jr.
J. M. Ulie, RIII

(B) Which designated NRC official resolved the DPO?

ANSWER.

Mr. Harold R. Denton, former Director, Office of Nuclear Reactor Regulation, resolved the DPO. Mr. Denton requested that Mr. Faust Rosa, Chief of the Electrical, Instrumentation and Control Systems Branch, conduct an independent assessment of the DPO and advise him on this matter, in accordance with NRC Manual Chapter 4125. A copy of Mr. Denton's memorandum that resolved the DPO is attached.

Attachment:
12/11/85 Resolution of DPO

QUESTION 12(B) Attachment

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555

December 11, 1985

MEMORANDUM FOR: Dennis J. Kubicki
Division of PWR Licensing-B, NRR

John F. Stang
Division of BWR Licensing

Chuck Ramsey
Region III

Joe Ulie
Region III

FROM: Harold R. Denton, Director
Office of Nuclear Reactor Regulation

SUBJECT: RESOLUTION OF YOUR DIFFERING PROFESSIONAL OPINION ON THE "INTERPRETATIONS OF APPENDIX R"

This memorandum responds to your differing professional opinion (DPO) dated May 2, 1984. The DPO concerns certain new interpretations of Appendix R which you consider contrary to existing guidance and not conducive to timely or consistent resolution of Appendix R issues.

On June 15, 1984, I designated Mr. Faust Rosa as the responsible manager for conducting an independent assessment of your views. I have reviewed your DPO as well as the related material contained in Mr. Rosa's memorandum to me dated November 27, 1985 (Enclosure 1) and have decided to adopt the resolution recommended in Mr. Rosa's memorandum. This decision is based on consideration of the following actions taken since the DPO was filed.

The issues raised by the DPO are not of a technical nature but relate to NRC fire protection policy. Subsequent to your DPO, a comprehensive review encompassing all aspects of fire protection policy and programs was performed by the Steering Committee on Fire Protection Policy. This Committee, which was composed of individuals at the Division Director level of management, drew its membership from NRR, ELD, IE, and three of the Regions. In regard to the DPO, the Steering Committee reviewed the positions defined in the "Interpretations" and concluded that they are technically and legally consistent with the requirements of Appendix R. The Steering Committee also concluded that the recommended positions would provide an improved means for achieving compliance with Appendix R. The Committee also affirmed the original staff position that pertains to this DPO. Based on the Committee's findings, the staff has recommended to the Commission (SECY-85-306) that the "Interpretations of Appendix R" be formally issued.

December 11, 1985

Based on the above evaluations, I have determined that your DPO does not justify modification of the management position taken in SECY-85-306. Therefore, I consider the DPO resolved in accordance with NRC Manual Appendix 4125, Section G.1.c.

I have noted that Mr. Stang, in his memorandum to Mr. J. A. Zwolinski dated September 20, 1985, states that he finds the staff recommendation for resolution of the DPO (SECY-85-306, September 17, 1985) to be acceptable and that he now considers the DPO closed. I also note that Mr. Randy Eberly, who also filed this DPO, has left the Nuclear Regulatory Commission and, in accordance with Manual Chapter 4125, is not being provided a copy of this memorandum.

HR Denton

Harold R. Denton, Director
Office of Nuclear Reactor Regulation

Enclosure:
Memorandum dated 11/27/85 from
F. Rosa to H. Denton

cc: W. Dircks
R. Scroggins
J. Keppler
H. Thompson
F. Miraglia
R. Bernero
F. Rosa

ENCLOSURE 1

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

NOV 2[illegible] 1985

MEMORANDUM FOR: Harold R. Denton, Director
Office of Nuclear Reactor Regulation

FROM: Faust Rosa, Chief
Electrical, Instrumentation & Control Systems Branch
Division of PWR Licensing A

SUBJECT: RECOMMENDED RESOLUTION OF THE DPO ON
"INTERPRETATIONS OF APPENDIX R"

As requested by your memorandum of June 15, 1984, I have conducted an independent assessment of the subject differing professional opinion (DPO). The DPO was filed jointly by five staff fire protection engineers (R. Eberly, D. J. Kubicki, and J. F. Stang, Jr. of CMEB/NRR; and C. B. Ramsey and J. M. Ulie of RIII). The DPO concerns certain new interpretations of Appendix R which are considered by these staff members to be contrary to existing guidance and not conducive to timely or consistent resolution of Appendix R issues. Based on my assessment, I have concluded that the DPO fails to justify modification of a management decision, policy position, or a proposed or existing agency practice. Therefore, I recommend that no action need be taken, i.e., that the DPO be considered resolved in accordance with NRC Manual Appendix 4125, Section G.1.c. The basis for this conclusion is provided in the following paragraphs. Enclosure 1 provides a chronology of DPO documentation and a list of relevant reference documents.

The DPO, which was filed on May 2, 1984, takes issue with the proposed new "Interpretations of Appendix R" (Fire Protection Program for Nuclear Power Facilities Operating Prior To January 1, 1979). The proposed interpretations were developed by management level fire protection staff with input from IE, ELD and DEDROGR. A draft of the proposed interpretations was distributed to and discussed with utility representatives at the NRC Regional Workshops on Fire Protection held during the March-April 1984 time frame. At these workshops the draft was characterized as being tentative, with formal issuance at a later date being considered.

The staff DPO is primarily concerned with Section 4, Fire Area Boundaries, and Section 5, Automatic Detection and Suppression, of the Interpretations of Appendix R. The Interpretations allow penetrations in fire area boundaries and partial area coverage for fire suppression and detection if it can be established by analysis that adequate protection is provided for the fire hazards associated with the area. Such analyses have previously been approved by the staff as exemptions. Additionally, in contrast with prior practice, the "Interpretations" do not require submission of fire hazards analyses for staff review or the filing of exemption requests prior to fire protection inspections; but the

ENCLOSURE 1

analysis must be available for NRC audit. The DPO states that not requiring exemption requests is in conflict with Generic Letter 83-33 which was issued previously to clarify staff positions on these and other issues, and which is deemed preferable.

The issues raised by the DPO are not of a technical nature but relate to NRC fire protection policy. Therefore, a resolution could only come about as a result of a comprehensive review of this policy undertaken by an appropriate level of NRC management. Such a review has been performed by the Steering Committee on Fire Protection Policy which was convened for this purpose in September 1984. This committee, which was composed of individuals at the Division Director level of management, drew its membership from NRR, ELD, IE, and three of the Regions. The recommendations and the fire protection guidance package contained in the Steering Committee final report were incorporated in SECY-85-306 (Enclosure 2) which was submitted to the Commission by the EDO on September 17, 1985. Enclosure 2, in addition to the staff recommendations and the guidance package, includes discussions of all aspects of the fire protection issue including the DPO and, with its enclosures, documents the scope and depth of the policy and program review performed by the Steering Committee.

The "Interpretations of Appendix R" which are included in the guidance package do not differ significantly from the original version on which the DPO was based. The Steering Committee reviewed the positions defined in the "Interpretations" and concluded that they are technically and legally consistent with the requirements of Appendix R. Enclosure 2 includes a staff recommendation to the Commission to formally issue the "Interpretations."

In making my assessment of the DPO I have: (1) evaluated the DPO documentation and references listed in Enclosure 1, (2) met with the DPO originators and other senior staff members involved in fire protection to explore the technical, legal and procedural aspects of the issue, and (3) participated in the discussions of the DPO and related fire protection concerns in the meetings of the Steering Committee (as Chairman of its Working Group). I concur in the Steering Committee's conclusion that the positions defined in the "Interpretations" are technically and legally consistent with Appendix R. I further conclude that this issue has received the management review commensurate to its importance to safety. My recommendation for resolution of the DPO is based on this assessment.

A Commission meeting was held on October 3, 1985 to discuss the staff recommendations. At this meeting the Commission requested that the originators of the DPO provide a written summary statement of their position in view of the staff's recommendation in regard to the DPO. (It is noted that to date the Commission has not taken action on the staff recommendations.)

In a response to the Commission's request, Mr. Stang stated that the proposed resolution adequately satisfies his concerns raised in the DPO and that he considers the DPO resolved.

ENCLOSURE 1

Mr. Ulie's response provided additional comments on the possible adverse effects of implementing the "Interpretations." He also indicated that the intent of his DPO was to make NRC management aware that the "Interpretations" represented a significant change in NRC policy and practice, and that this objective had been achieved. In a recent telephone conversation with me, Mr. Ulie confirmed that he now considers the DPO issue closed.

Mr. Ramsey's response provides detailed comments primarly expressing disagreement with the staff recommendations in the following areas: adequacy of current guidance to the industry, documentation required to demonstrate compliance, Interpretations of Appendix R, Appendix R Questions and Answers, QA requirements, and fire hazard analysis. Most of these comments extend beyond the scope of the original DPO. However, in my view, they do not change the basic character of the DPO which relates to matters of NRC fire protection policy. The Steering Committee review of fire protection policy encompassed the areas addressed by these additional comments. Therefore, I conclude that the resolution of the DPO on the basis described above remains valid.

Mr. Kubicki has not provided a written response to the Commission's request. However, in a recent conversation with me on this matter he indicated that his views as expressed in the DPO remain unchanged.

It should also be noted, as a matter of record, that Mr. Eberly has left the Commission for employment in the private sector. No further action is required by Manual Chapter 4125 in this case.

In summary, my resolution of the DPO is based on the premise that the DPO is primarily concerned with NRC fire protection policy and, therefore, its resolution could only come about through a comprehensive review of this policy by an appropriate level of NRC management. Such a review has been completed by the Steering Committee on Fire Protection Policy. The conclusion reached by the Steering Committee is that the "Interpretations of Appendix R" is technically and legally consistent with Appendix R. Based on this the staff has recommended to the Commission that the "Interpretations" be formally issued. This in effect, states, that the DPO fails to justify modification of a management decision, policy position, or a proposed or existing agency practice. Therefore, I recommend that no action need be taken, i.e., that the DPO be considered resolved in accordance with NRC Manual Appendix 4125, Section G.1.c.

Faust Rosa

Faust Rosa, Chief
Electrical, Instrumentation &
Control Systems Branch
Division of PWR Licensing A

Enclosures/cc: See next page

ENCLOSURE 1

Enclosures:
1) Chronology of DPO Documentation and Listing of Relevant References
2) SECY-85-306, Staff Recommendations Regarding the Implementation of Appendix R to 10CFR50 dated September 17, 1985

cc: w/o Enclosure 2:
D. G. Eisenhut
T. E. Murley, RI
J. N. Grace, RII
J. G. Keppler, RIII
R. H. Vollmer
H. Thompson
W. V. Johnston
J. L. Funches
J. E. Lyons
V. Benaroya
R. L. Ferguson
W. M. Shields
T. V. Wambach

cc: w/Enclosures:
D. J. Kubicki
C. B. Ramsey, RIII
J. F. Stang, Jr.
J. M. Ulie, RIII

ENCLOSURE 1

CHRONOLOGY OF DPO DOCUMENTATION AND LISTING OF RELEVANT REFERENCES

CHRONOLOGY:

1. May 2, 1984, Memo from Randy Eberly, Dennis Kubicki, Chuck Ramsey, John Stang and Joe Ulie to R. L. Ferguson; Differing Professional Opinion - "Interpretations of Appendix R."

2. May 3, 1984, Memo from R. H. Vollmer to the other NRR Division Directors, DPO and Interpretations of Appendix R.

3. May 7, 1984, Memo from R. L. Ferguson to Randy Eberly, Dennis Kubicki, Chuck Ramsey, John Stang and Joe Ulie; Differing Professional Opinion - "Interpretations of Appendix R."

4. May 11, 1984, Memo from V. Benaroya to R. H. Vollmer, Differing Professional Opinion - "Interpretations of Appendix R."

5. May 30, 1984, Memo from R. L. Ferguson to H. R. Denton, Differing Professional Opinion - "Interpretations of Appendix R."

6. Undated/Copy delivered by originator May 31, 1984, Memo from G. Harrison to Commission Victor Gilinsky, Differing Professional Opinion -. "Interpretations of Appendix R" dated May 2, 1984, Eberly, et al.

7. May 30, 1984, Memo from R. H. Vollmer to H. R. Denton, Differing Professional Opinion - "Interpretations of Appendix R."

8. June 15, 1984, Memo from H. R. Denton to F. Rosa, Differing Professional Opinion - Interpretation of Appendix R.

9. July 6, 1984, Memo from F. Rosa to H. R. Denton, Differing Professional Opinion - Interpretation of Appendix R.

10. July 12, 1984, Memo from H. R. Denton to F. Rosa, Differing Professional Opinion - Interpretation of Appendix R.

11. July 17, 1984, Memo from J. G. Keppler to R. C. DeYoung, Commissioners' Request For Information on Fire Protection Differing Professional Opinion and Inspection Experience.

12. August 9, 1984, Memo from H. R. Denton to F. Rosa, Differing Professional Opinion - Interpretations of Appendix R.

13. Oct. 4, 1984, Memo from H. R. Denton to W. J. Dircks, Differing Professional Opinion On Interpretations of Appendix R; Action Plan.

14. November 9, 1984, Memo from H. R. Denton to L. W. Barry, Quarterly Report: Differing Professional Opinion.

15. February 7, 1985, Memo from F. Rosa to H. R. Denton, Differing Professional Opinion on Interpretations of Appendix R, Status and Action Plan Update.

16. February 26, 1985, Memo from H. R. Denton to W. J. Dircks, Request for Extension For Resolution of the Differing Professional Opinion On Interpretations of Appendix R.

17. September 17, 1985, SECY-85-306, Staff Recommendations Regarding the Implementation of Appendix R.

18. September 20, 1985, Memo from J. Stang to J. A. Zwolinski, Differing Professional Opinion - "Interpretations of Appendix R." May 2, 1984.

19. October 25, 1985, Memo from J. M. Ulie to J. G. Keppler, Request by the Commissioners For the DPO Originators to Write a Summary Statement Regarding Their Position On the Fire Protection Policy Steering Committee's Proposed Resolution of the DPO.

20. October 25, 1985, Memo from C. Ramsey to J. G. Keppler Request by the Commissioners for the DPO Originators to Write a Summary Statement Regarding Their Position On the Fire Protection Policy Steering Committee's Recommendations Contained in Generic Letter 85-01.

21. November 14, 1985, Memo from C. Ramsey to R. Ferguson, Supplemental Response to Generic Letter No. 85-01 and SECY Paper No. 85-306.

REFERENCES

1. 10 CFR 50.48 Fire Protection.

2. 10 CFR 50, Appendix R - Fire Protection Program for Nuclear Power Facilities Operating Prior To January 1, 1979.

3. NUREG-0800 Section 9.5.1, Fire Protection Program, Rev. 3 - July 1981.

4. Branch Technical Position CMEB 9.5-1 (Formerly BTP ASB 9.5-1), Guidelines for Fire Protection for Nuclear Power Plants, Rev. 2 - July 1981.

5. Generic Letter 83-33, NRC Positions On Certain Requirements of Appendix R to 10 CFR 50, October 19, 1983.

10K6 Fire Prot.

September 17, 1985 SECY-85-306

RULEMAKING ISSUE
(Notation Vote)

For: The Commissioners

From: William J. Dircks
Executive Director for Operations

Subject: STAFF RECOMMENDATIONS REGARDING THE IMPLEMENTATION OF APPENDIX R TO 10 CFR 50

Purpose: To provide the Commission with recommendations for expediting and improving the implementation of Appendix R (Fire Protection), and to provide a discussion of related issues raised by a member of OGC and by several fire protection staff members.

Background: The initial inspections for compliance with the safe shutdown provisions of Appendix R to 10 CFR Part 50, at facilities where compliance with Appendix R was believed to be complete by the licensee, revealed a number of instances of noncompliance and enforcement actions were being proposed. In late 1983, the EDO initiated a consultation between headquarters and the regions which concluded that uncertainty still existed over the staff requirements and suggested that a series of regional workshops be organized to discuss fire protection and answer questions from the licensees. The Nuclear Utility Fire Protection Group (NUFPG) organized a meeting to precede these workshops to solicit industry experience in fire protection programs and compile for the NRC questions which they felt needed answering.

The NUFPG also initiated discussions with the staff on whether a licensee may propose an alternative means of complying with certain Appendix R issues covered by Generic Letter 83-33, if backed by a technical justification. In such cases, an exemption would not be needed if an alternative means of

Contact: W. Johnston
Ext. 27331

SECY NOTE: This subject is scheduled for discussion at an Open Meeting at 10:00 a.m., Thursday, October 3, 1985. An advanced copy of this paper was provided Commissioner Offices on September 17.

compliance is provided in areas where Appendix R is non-specific. The result of these discussions was a document called "Interpretations of Appendix R."*

The workshops were held in the spring of 1984. At these workshops a package of NRC guidance was distributed to each attendee which included NRC staff responses to industry questions and the "Interpretations" document. The cover memo for the package explained that it was a draft package which would be issued in final form via a generic letter following the workshops.

During the same timeframe, the staff began to develop enforcement guidance on Appendix R. Draft guidance was developed in the spring of 1984 and it was determined that, until the guidance and the interpretations of the rule were completed, enforcement actions based upon Appendix R should be placed on hold. Four cases arising in late 1983, early 1984 and two more recent cases were and still are in this status.

On May 30, 1984, the staff briefed the Commission on the status of the implementation of Appendix R and discussed the issues raised by several NRC fire protection engineers in a Differing Professional Opinion (DPO) and by a member of OGC. At this meeting, the Commission requested that the implementation guidance be submitted for Commission approval prior to its issuance to industry.

Following the Commission meeting, NRR was requested by the EDO to form a Steering Committee on Fire Protection Policy to examine all current licensing, inspection and technical issues, and to develop policy recommendations aimed at expediting Appendix R compliance for pre-1979 plants. The Steering Committee drew its membership from three of the Regions, IE, and ELD. Richard Vollmer, then of NRR, was Chairman. Following a series of meetings, which included discussions with all agency fire protection engineers, the Steering Committee issued a report to the EDO (Enclosure 1) in October 1984 containing a number of recommendations for improving the consistency of the levels of fire protection safety and for enhancing the implementation of Appendix R.

Following comment by the Program Offices and the regions, the EDO directed in December 1984 that the Steering Committee Report be issued for public comment. Comments were received from the NUFPG, utilities, and consultants. On May 3, 1985, the Fire Protection Steering Committee issued updated recommendations which reflect resolution of these comments (Enclosure 2).

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*This document was later disputed by a member of OGC, and several staff members initiated a differing professional opinion.

The Steering Committee's principal recommendations are as follows:

1. Promptly issue a generic letter (Enclosure 3) informing all licensees that:

   a. Extensions to 50.48c schedules will no longer be granted except where a licensee has an approved "living schedule."

   b. Inspections will include plants with uncompleted modifications as well as plants with completed modifications. In addition, licensees may request an inspection to help avoid costly design and implementation decisions with which the staff may disagree.

   c. Documentation of valid analysis supporting fire protection features must be available for inspection.

   d. Quality assurance measures should be in effect to assure that fire protection systems will function as intended.

   e. Licensees are required to notify the NRC when deficiencies are discovered pursuant to 10 CFR 50.72 and 50.73.

   f. A standard fire protection license condition is available which will clarify the licensee's options in making modifications to the fire protection program.

2. Accompany the generic letter with the following guidance documents:

   o Interpretations of Appendix R (Enclosure 4).*

   o Appendix R Questions and Answers (Enclosure 5).

   o Fire Protection License Condition (Enclosure 6).

3. Adoption of proposed Guidance For Enforcement Actions Concerning Fire Protection Requirements (Enclosure 7).

Further consideration of the positions taken by the Steering Committee regarding extensions to 50.48(c) schedules and a proposed standard fire protection license condition have raised policy and legal issues which are worthy of the Commission's attention.

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*These interpretations represent staff positions, and should not be considered as official agency interpretations issued by the General Counsel. See 10 CFR 1.32; 10 CFR Part 8.

1. The utility has, since the promulgation of Appendix R in 1980, proceeded expeditiously to meet the Commission's requirements.

2. The delay is caused by circumstances beyond the utility's control.

3. The proposed schedule for completion represents a best effort under the circumstances.

4. Adequate interim compensatory measures will be taken until compliance is achieved.

License Conditions

Most licenses contain a fire protection license condition. License conditions for plants licensed prior to January 1, 1979, contain a condition requiring implementation of modifications committed to by the licensee as a result of the reviews against the Branch Technical Position. These license conditions were added by amendments issued between 1977 and February 17, 1981, the effective date of 10 CFR 50.48 and Appendix R. In April 1981, the Commission decided ~~that,~~ until a fire protection rule for future plants was approved, "new licenses (those issued after January 1, 1979) should contain a condition requiring compliance with commitments made by an applicant and agreed to by the staff."

Because of the evolving nature of the approach to fire protection, license conditions for plants licensed after Janaury 1, 1979, vary in scope and content. Some only list open items that must be resolved by a specified date or event, such as exceeding five percent power or the first refueling outage. Some reference a commitment to meet Appendix R; some reference the Final Safety Analysis Report (FSAR) and/or the NRC staff's SER. These variations have created problems for licensees and for NRC inspectors in identifying the operative and enforceable fire protection requirements at each facility.

These license conditions also create difficulties because they do not specify when a licensee may make changes to the approved program without requesting a license amendment. If the fire protection program committed to by the licensee is required by a specific license condition, the provisions of 10 CFR 50.59 may not be applied to make changes without prior NRC approval. Thus licensees may be required to submit amendment requests even for relatively minor changes to the fire protection program. One means of reducing this diversity and to increase

Interpretations Document

The Steering Committee carefully reviewed the "Interpretations" and concluded that they will provide an improved means of achieving compliance with Appendix R. Concurrence with this position was received from the Regional Administrators and there were no substantive comments on this document received from the public. The Appendix R Questions and Answers include the questions posed by the industry and are supplemented with additional questions identified at the regional workshops. These responses may be used as guidance for design, review, and inspection activities. Minor revisions have been made in consideration of public comments and for consistency with the "Interpretations" document.

Trubatch Comments

The Commission also requested that the staff comment on the OGC memorandum and the differing professional opinions. Mr. Trubatch raises objections to five parts of the Interpretations document: fire boundaries, cold shutdown, automatic detection and suppression, fire damage, and alternate shutdown. A response to Mr. Trubatch's legal concerns has been prepared by OELD (Enclosure 8).

Two comments from Mr. Trubatch relate to the staff's handling of fire damage and alternate or dedicated shutdown. The staff has not changed its position regarding the need for licensees to consider the effect of suppressants when assuring that "the structure, system, or component under consideration is capable of performing its intended function during and after the postulated fire, as needed." The purpose of this interpretation of fire damage is to clarify that cosmetic damage, which does not interfere with the above capabilities, would not be a basis for rejection of an exemption request.

The position of the staff has also not changed in regard to the need for adequate separation of alternative shutdown equipment from normal shutdown equipment. However, Appendix R, in mentioning "room, or zone" in addition to "area," clearly implies that compliance may be achieved by other than separation by fire areas. The staff has recognized this and has granted exemptions in the past. What is changing is the recognition that compliance with Appendix R can be established with adequate justification and exemptions need not be requested. The "room" concept must be justified by preparation of a detailed fire hazards analysis that demonstrates that a single fire will not disable both normal shutdown equipment and the alternate shutdown capability.

3. Utilize the guidance in Enclosure 7 as the criteria for enforcement of Appendix R requirements and proceed to evaluate and issue pending enforcement cases in accordance with this guidance.

4. Remove the fire protection license condition from future licenses if the fire protection plan is incorporated in the FSAR.

5. Evaluate the appropriate approach and need for fire protection Technical Specifications in conjunction with the ongoing effort on Technical Specification improvements.

William J. Dircks
Executive Director for Operations

Enclosures: — IN BP

1. Memo dtd 10/26/84 to Dircks fm Fire Protection Policy Steering Committee
2. Memo dtd 5/3/85 to Denton fm Vollmer
3. Generic Ltr on Fire Protection
4. Interpretations of Appendix R
5. Appendix R Questions & Answers
6. Fire Protection License Condition
7. Guidance for Enforcement Actions Concerning Fire Protection Requirements
8. Memo dtd 6/27/84 to Vollmer fm Olmstead
9. Steering Committee Resolution of Public Comments

(C) If the DPO was not resolved in favor of the fire protection engineers, did they file an appeal to the decision? If not, why not?

ANSWER.

No further action was taken by the engineers. The DPO was viewed as a mechanism to convey their views to upper level management. This goal was achieved. The fire protection engineers indicated they thought an appeal of the decision would be counterproductive. At the request of then-Commissioner James Asselstine, the fire protection engineers met with him and Commission staff members to respond to their questions regarding the DPO.

QUESTION 13. On April 24, 1986, the NRC issued Generic Letter 86-10 implementing the new Appendix R interpretations.

(A) How many exemptions have been requested by utilities since NRC issued GL 86-10?

ANSWER.

The total number of exemptions is not readily available. We will provide a response to this question within 60 days.

QUESTION 13. (continued) - 2 -

(B) Which utilities filed for exemptions?

ANSWER.

A complete list is not yet available. However, the following licensees presently have exemption requests pending with the staff:

1. Northeast Utilities
2. General Public Utilities
3. Commonwealth Edison Company
4. Duke Power Company
5. Boston Edison Company
6. TVA
7. Wisconsin Public Service Corporation
8. Virginia Electric Power Company

A complete list will be available within 60 days.

QUESTION 13. (continued) - 3 -

(C) What is the current status of those exemption requests?

ANSWER.

A number of the exemptions and the associated staff safety evaluations are awaiting issuance; the remainder are being evaluated. The number of pending exemptions varies as new exemptions are submitted by licensees and others are issued by the staff. A complete status of exemption requests will be available within 60 days.

QUESTION 23. In his October 8, 1987 testimony before the Subcommittee, Mr. Stello gave examples of the staff and OI working together to take necessary regulatory action even before investigations were complete. Has the staff had to delay regulatory actions while OI continued its investigations. Please describe specific examples, if any, where this has occurred.

ANSWER.

In answering this question it is necessary to review the role of the Office of Investigations (OI). The function of OI is to develop information to assist the NRC in reaching regulatory decisions. It follows that in cases where OI has been requested to conduct an investigation, the NRC is not in a position to fully resolve its regulatory concerns until the investigation is completed.

However, the NRC need not wait until the investigation is complete before initiating regulatory action. Where NRC has developed sufficient information through its inspection or investigative process to reach a determination that the public health or safety requires immediate action, the NRC does act. As pointed out by the testimony of Mr. Stello, NRC may act even before an investigation is complete or the Department of Justice completes its review of a criminal referral from OI. The NRC will act whenever the communication of critical information to a licensee is necessary to protect public health and safety. Communicating safety information is more fully explained in the attached memorandum, dated March 2, 1987, on "The Timing of the Disclosure to

Licensees of Pending Investigations and/or Criminal Referrals." All such actions are coordinated with OI and DOJ if a criminal referral is involved, to avoid unnecessary impact on investigations.

Thus, from a safety perspective the pendency of an OI investigation should not delay regulatory action where it is determined immediate corrective action is required. However, if immediate enforcement action is not necessary, the staff normally defers enforcement action such as show cause orders, civil penalties, or notices of violations until the investigation is completed and DOJ has completed its review of any referral. The results of the investigation may provide the basis for NRC's enforcement action, and the NRC may consider the nature of any criminal sanctions in determining the scope of NRC's own enforcement action.

Delays in final agency actions do sometimes occur as the result of pending investigations due to the number of outstanding investigations, available resources, complexity of the issues, and the varying degrees of investigation priorities. In cases such as those involving D. C. Cook, Rancho Seco, Dresden, LaSalle, Davis Besse, US Testing, and Milford Hospital, the staff had completed its technical inspection but has held up or is holding up enforcement actions pending the results of the investigation to determine whether the violations were deliberate and the degree, if any, of management involvement. If wrongdoing is found, then further delays may occur awaiting the DOJ process.

Attachment:
"The Timing of the Disclosure
to Licensees of Pending Investigations
and/or Criminal Referrals", dtd 3/2/87

1/27/88 BREAUX Q23

QUESTION 23 Attachment

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

March 2, 1987

MEMORANDUM FOR: Office Directors and Regional Administrators

FROM: Victor Stello, Jr.
Executive Director for Operations

SUBJECT: THE TIMING OF THE DISCLOSURE TO LICENSEES OF PENDING INVESTIGATIONS AND/OR CRIMINAL REFERRALS

The objective of the NRC in disseminating information to its licensees is to transmit safety-related information promptly to obtain appropriate evaluation and timely corrective actions while at the same time avoiding the disclosure of information which could reveal the identity of confidential sources or compromise an actual or potential investigation or criminal referral. These competing interests must be constantly balanced in making decisions that best protect the public health and safety.

This memorandum deals only with the disclosure of a pending investigation or criminal referral. This policy on the disclosure of pending investigations or criminal referrals to the licensee will be incorporated into an NRC manual chapter. It supersedes all previous guidance on this subject. Commission policy on revealing the identity of confidential sources is presented in the Statement of Policy on Confidentiality, dated November 19, 1985.

I. Communications with licensees during the inspection/investigation process

Nuclear safety and security concerns must be addressed by prompt, positive actions. Accordingly, except as described below, safety or security information must be promptly and clearly identified to responsible licensee management to obtain timely licensee evaluation and, if appropriate, safety-related corrective actions. Similarly, items of noncompliance should be brought to the attention of a licensee for correction. Clear communications are necessary to maintain required levels of safety and security at licensed facilities. Generally, there should be no need to disclose the fact that an investigation is either contemplated or under way when providing information to a licensee pertaining to safety concerns or to obtain correction of a specific technical issue. However,

A. When information cannot be released without risk of compromising an investigation, the Regional Administrator shall inform the Director, OI, in advance that information related to an open investigation is being considered for release to the licensee because safety or security concerns require initiation of immediate corrective actions before publication of the investigation report. The Director, OI, will review the information to be released and advise the Regional Administrator of the anticipated effect of its release on the course of the investigation. The Regional Administrator will release the information only after determining that the safety or security concerns are significant enough to justify the risk of compromising the effectiveness of the pending investigation and, possibly, subsequent enforcement or prosecution options. Any such release of information should be recorded in the investigation report.

In the event of an emergency, or a significant safety or security issue which appears to require immediate action, NRC employees, at their discretion, may discuss with, show to, or provide the licensee any pertinent material they believe the circumstances warrant. If time permits, regional management should be consulted first.

An emergency situation is one in which, in the opinion of the senior NRC employee knowing of the situation, a present danger to public health or safety or to the common defense requires the release of investigative information to a licensee without the delay necessary to consult with appropriate OI personnel. Examples of such types of emergency situations are those that involve a potential radiation overexposure to personnel or a potential release of radioactivity to the environment. For example, if an NRC employee knew, through an investigation, that falsified calculations were used to determine the radioactivity of the contents of a tank and there was a clear potential for the release of the contents to the environment, the NRC employee should stop the release immediately, even though such action might reveal the existence of an investigation.

Likewise, if an NRC employee who solely because of information gained from an investigation was in a position to prevent a radiation overexposure to someone, the NRC employee should intervene even though the intervention might compromise the investigation.

As soon as practical after a release of investigations information in such an emergency situation, regional management, the EDO and OI shall be informed of the details regarding the information disclosure. In all other instances in which there is not an immediate danger to public health or safety, the staff is required to consult with OI before releasing investigations information.

B. As previously stated, generally there should be no need to link the fact that an investigation is under way when providing information to licensees pertaining to potential safety concerns or to obtain correction of a specific technical issue. However, when for the reasons stated above, the Regional Administrator decides after consultation with OI to delay informing a licensee of an issue, this decision and the basis on which the delay is found to be consistent with public health and safety should be documented by the appropriate Regional Administrator and the decision reexamined every three months to assure its continuing validity.

II. Department of Justice

As a general rule, the fact that a particular matter has been or will be referred to the Department of Justice (DOJ) should never be disclosed to the licensee. A reply of "I cannot comment on that matter" is appropriate in most cases. However, if a Regional Administrator or Office Director feels he or she must disclose that a referral has been or will be made to the Department of Justice, such disclosure will be made only with the prior concurrence of the Director, OI.

III. Enforcement Actions

Enforcement actions which could reveal the existence of a pending investigation should be coordinated with the Director, OI. The Director, OI, should be provided with the reasons why the enforcement action should proceed during the pending investigation.

Victor Stello, Jr.

Victor Stello, Jr.
Executive Director for Operations

cc: OGC
SECY
OI
OIA

QUESTION 28. In his testimony before the Subcommittee on October 20, 1987, Chairman Zech said that the NRC expertise with respect to training ". . . is in the regulatory side of it . . . ." Chairman Zech also noted that the industry must meet NRC standards for training nuclear power plant personnel. However, through a policy statement, the NRC has endorsed an INPO-managed training accreditation program for nuclear power plant personnel.

(A) Describe what NRC training standards the Commission has imposed on the industry.

ANSWER.

First, the INPO accreditation program documents contain standards which are endorsed by the NRC, and we are auditing the utilities programs on an ongoing basis. In addition, the final rulemaking revising 10 CFR 55, Operator's Licensing and Conforming Amendments, was published on March 25, 1987 in 52 FR 9453. This regulation and two Regulatory Guides (RGs) were published at that time to provide guidance on training of licensed operators. The two Regulatory Guides, RG 1.149, Revision 2, "Nuclear Power Plant Simulation Facilities for Use in Operator License Examinations," and RG 1.8, Revision 2, "Qualification and Training of Personnel for Nuclear Power Plants," directly address training and examination issues.

The revision to 10 CFR 55 is responsive to Section 306 of the Nuclear Waste Policy Act (NWPA) of 1982, which directed the Commission to develop regulations or other regulatory guidance for training in the nuclear power industry. The NWPA also resulted in the issuance of the Commission's Policy Statement on Training and Qualification (50 FR 11147, March 20, 1985). In addition, the Policy Statement includes the standards for effective performance-based training, which consist of the following five elements:

1. Systematic analysis of the jobs to be performed.
2. Learning objectives derived from the analysis, which describes desired performance after training.
3. Training design and implementation based on the learning objectives.
4. Evaluation of trainees' mastery of the objectives during training.
5. Evaluation and revision of the training based on the performance of trained personnel in the job setting.

To ensure that industry training programs conform to these standards, the staff has conducted post-accreditation audits at certain facilities using NUREG-1220, "Training Review Criteria and Procedures."

(B) Describe what input the NRC had in developing INPO's accreditation program for nuclear power plant personnel. In your discussion, include a list of all meetings between NRC staff and NUMARC/INPO members.

ANSWER.

Beginning in 1982, discussions were held between NRC and the INPO staff on the concept of accreditation. Since then the NRC and INPO have communicated frequently regarding accreditation status and results of NRC evaluations. INPO has considered these findings in making modifications and enhancements to its accreditation programs. The meetings which the staff can specifically identify between INPO and NRC are listed below:

December 17, 1982
June 16, 1983
September 13, 1983
December 13, 1983
March 13, 1984
June 12, 1984
September 17, 1984
December 13, 1984
March 13, 1985
June 12, 1985
September 12, 1985
February 25, 1986
November 25, 1986
September 28, 1987
January 15, 1988

QUESTION 28. (continued) - 4 -

(C) What is the NRC's oversight role with respect to INPO's training program for power plant personnel?

ANSWER.

To ensure that the industry's training program improvements are effective, the NRC closely monitors the INPO accreditation process and its results by:

1. Nominating a member to serve on each Accrediting Board.
2. Having an NRC staff member attend and observe Accrediting Board meetings with the INPO staff and/or the utility representatives.
3. Periodically observing accreditation team site visits.
4. Accompanying INPO on selected plant evaluations.
5. Meeting with INPO to share information on accreditation activities and inspection results.
6. Reviewing pertinent accreditation documents.
7. Including a summary of training effectiveness as part of each Systematic Assessment Report of Licensee Performance (SALP) Report.
8. Conducting post-accreditation audits.
9. Monitoring plant and industry trends and events involving personnel errors.
10. Conducting operator licensing exams.
11. Conducting operator requalification exams, consistent with Commission policy.
12. Conducting performance-oriented training inspections to assess the level of knowledge of plant personnel.

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(D) Has the NRC ever taken any other enforcement action against a utility because its training program was conducted in an unsatisfactory manner? Please describe.

ANSWER.

While we do not track enforcement cases by subject area such as training, the staff has reviewed past cases and has found at least six cases in the past four years involving significant violations, some with civil penalties, where training was either the underlying violation or was highlighted in enforcement correspondence. These cases are: Grand Gulf (operator training), Crystal River (operator training), Robinson (fire protection training), Point Beach (health physics training), Trojan (health physics training), and Catawba (procedure training).

In addition, in the past four years there have been a number of cases involving less significant violations related to training matters, including emergency preparedness, quality assurance, fire brigade, health physics or radiological waste handling, operator, and security training.

QUESTION 28. (continued) - 6 -

(E) Describe all the potential enforcement actions the NRC can take to ensure that utilities are properly training their employees.

ANSWER:

While the NRC's policy statement did provide a grace period from enforcement, it also provided that violations which are not corrected in a timely manner, violations of any applicable reporting requirement, and any willful violation may be subject to enforcement action. In these cases the full range of enforcement sanctions, including notices of violation, civil penalties, and orders of various types, could be used as well as related administrative mechanisms such as bulletin, confirmatory action letters, and notices of deviation. In brief, the NRC's decision to use discretion in enforcement in order to recognize industry initiatives in no way changes the NRC's ability to issue orders, call enforcement meetings, or suspend licenses when a safety problem is found.

In other cases in which training deficiencies are the root cause of a violation, the NRC may cite a violation, propose a civil penalty, or issue an order, as appropriate. While not citing licensees in a Notice of Violation for a deficiency in the training area, the NRC could highlight the weaknesses in the training area in the letter to the licensee.

(F) Since the NRC has endorsed INPO's training program, explain the extent of NRC's oversight over the implementation of this program.

ANSWER.

In accordance with the monitoring activities described in Question 28(C) above, the NRC staff conducted routine annual training inspections at all plants. In addition, 165 training reviews related to operator examinations have been conducted that indicate not only the pass/fail rate but also generic weaknesses identified during the two-year evaluation period. SALP reviews for 39 plants which included a training element were also conducted. Senior NRC executives have attended most INPO Accreditation Board meetings. Also, the staff has conducted 9 post-accreditation reviews on a total of 22 individual training programs using the criteria in NUREG-1220.

QUESTION 30. NRC's policy statement on training nuclear power plant personnel deferred rulemaking on training and qualification for two years. What are the findings of NRC evaluations of the industry training and accreditation program?

ANSWER.

The conclusions of SECY 87-121, "The 2-Year Evaluation on Implementation of the Commission Policy Statement on Training and Qualification," state that significant progress is being made in improving training and implementing the Commission's Policy Statement. Although many training improvements have been observed, some training deficiencies and weaknesses continue to be identified through inspection and review activities. The staff expects to find these kinds of deficiencies, given the magnitude of the effort and the difficulty in implementing performance-based concepts by an industry that until recently based its training solely on NRC requirements. Also the staff has recommended some improvements and enhancement to the accreditation program. The staff's overall recommendation, which was adopted by the Commission, was to continue to endorse the INPO program and defer rulemaking for another 2-year period.

Attachment:
SECY 87-121

1/27/88 BREAUX Q30

QUESTION 30 Attachment

POLICY ISSUE
(Notation Vote)

May 11, 1987

SECY-87-121

For: The Commissioners

From: Victor Stello, Jr.
Executive Director for Operations

Subject: THE 2-YEAR EVALUATION ON IMPLEMENTATION OF THE COMMISSION POLICY STATEMENT ON TRAINING AND QUALIFICATION

Purpose: To inform the Commission of the staff's evaluation of industry's implementation of the Policy Statement on Training and Qualification of Nuclear Power Plant Personnel, and to obtain Commission guidance on revising the current Policy Statement.

Background: On February 7, 1985, the Commission adopted the Policy Statement on Training and Qualification (50 FR 11147, March 20, 1985). The Policy Statement endorsed the INPO-managed Training Accreditation Program and the industry, through NUMARC, commitment to have 10 programs at 61 sites (610 programs) ready for accreditation by December 31, 1986. In approving the Policy Statement, the Commission deferred rulemaking on training and qualification for 2 years in recognition of industry efforts and directed the staff to independently evaluate implementation of improvement programs.

SECY-86-119 provided a status report on implementation of the Policy Statement after 1 year. It concluded that significant progress was being made and recommended that rulemaking continue to be deferred. Areas of concern were noted, some of which have been addressed by publication of the revision to 10 CFR 55 (52 FR 9453, March 25, 1987) and development of INPO 86-025, "Guidelines for Continuing Training of Licensed Personnel," issued in October 1986.

Discussion: Each of the elements of the staff's independent evaluation is discussed in the Enclosure and is summarized below:

Accreditation Team Visit Observations - As of April 1, 1987, INPO has conducted 104 team visits covering 450 programs. They also conducted 10 team visits covering 38 programs at 6 newer facilities. NRC staff has observed 19 visits.

Contact:
H.J. Miller, NRR
492-4803

The staff has found Accreditation Team Visits to be thorough, constructive and professional. Utilization of peer evaluators significantly enhances the process. NRC observers have expressed concern about the potential for inconsistency in applying INPO's objectives and criteria from plant to plant. Over the past year, INPO has increased its attention to ensuring consistency in the application of objectives and criteria through meetings with team leaders, training of team reviewers and senior management review of all team visit reports.

Observations of the National Nuclear Accrediting Board - The Board has accredited 369 programs at 60 sites. Senior NRC staff members have observed all but a few of the Board meetings. The Board's review is independent, of high quality and professional. It relies heavily on the team visit report and subsequent interactions between the INPO staff and the utility. The post team visit results are provided as supplemental reports. In some cases, accreditation has been awarded based upon commitments for further training development and future program implementation. INPO's computer-based tracking system is used to ensure that these commitments are met. The Board reviews the status of commitments monthly. The Board has deferred accreditation in two instances.

Review of Plant-Specific Self Evaluation Reports (SER) and INPO Team Reports - INPO team reports, SERs and other documentation are available to the NRC during team visits, Board meetings and on site. Staff review of utility SERs, field notes, team reports and utility responses confirms that the reports are consistent with INPO guidance, are thorough and that INPO and utilities generally resolve recommendations prior to the Board meeting.

Training Inspections and SALP - Training inspection procedures were revised in June 1985 to be performance-based by focusing on the ability of the plant staff to perform their jobs after training rather than on the training program or development process.

Formal procedural guidance related to training program development, implementation and evaluation has improved at utilities; accreditation has increased utility management attention and commitment to training; and the quality of utility lesson plans and other related training materials have improved. However, a number of training program weaknesses continue to be identified in inspection reports on both accredited and nonaccredited programs. Shortcomings in training related to plant procedures, technical specifications, design changes, LERs, operational experience and industry events are prevalent. Also, specific training program content was deficient in a number of programs regardless of accreditation status.

In November of 1985, SALP procedures were revised to evaluate licensee training programs as a separate functional area. Review of SALP reports indicates positive effects of accreditation as demonstrated by well-staffed and qualified training departments, better-trained plant personnel and new or greatly enhanced training facilities. Concerns frequently identified in SALP reports include: (1) understanding of procedures; (2) requalification program administration; and (3) lack of nuclear specific detail in maintenance training and knowledge of the impact of maintenance activities on operations.

Post-Accreditation Reviews - Since SECY-86-119, the staff conducted five post-accreditation reviews (Salem, San Onofre, Callaway, Arkansas Nuclear One and WNP-2). A total of 20 individual training programs were reviewed over the 2-year evaluation period and findings from each were provided to INPO.

The Commission's Policy Statement sets forth five elements which are essential to effective performance-based training. In a Systems Approach to Training (SAT), each element is dependent on the preceding element with feedback to all preceding elements. New program development typically starts with the first element, Systematic Analysis of the Jobs to be Performed. However, for existing training programs, training system development can build on existing materials when used in conjunction with a needs analysis and continued evaluation of training needs based upon job performance feedback. This was the case for all but one of the programs reviewed.

The staff observations of all the accredited programs reviewed indicate that evaluation and feedback procedures are in place to allow effective modification of existing programs to be performance-based. All programs reviewed by the staff were implementing most aspects of the five essential elements. In some instances, need for further improvement was identified to INPO. An important finding from these reviews is that improvements are continuing to be made after accreditation has been received. Also, some utilities have expanded the use of performance-based training to programs beyond the original 10, e.g., QA/QC, Security, Emergency Response Teams.

As discussed in SECY 86-119, a concern identified at the sites reviewed by the staff is that a systematic approach to the development of requalification training was not performed. This was primarily due to a perceived conflict between NRC requirements and INPO accreditation criteria. However, based on the recently published revisions to 10 CFR Part 55 and issuance of INPO guidance on performance-based requalification training (INPO-86-025), this concern should be eliminated.

A summary of the findings from the post-accreditation reviews is in letters to INPO dated April 3, 1986, August 8, 1986, September 10, 1986, December 3, 1986, and April 6, 1987.

NRC Examination Results - Analysis of NRC examination results (including requalification examination results) does not show any statistically significant difference in pass/fail rates between accredited and nonaccredited training programs. Examination reports identify deficiencies in examination performance in the areas of procedures, technical specifications, Emergency Plan, reactor theory and system operation and design.

Status: The industry commitment to have 10 training programs at each of 61 sites "ready for accreditation" by December 31, 1986, (i.e., SERs accepted by INPO) was met. Based on the number of team visits remaining and programs that have not yet achieved accreditation, NRC staff expects that all programs will be accredited by mid-CY 1988. Seventeen facilities have achieved full member status in the National Academy for Nuclear Training by having all 10 training programs accredited.

Conclusion: Significant progress is being made by industry in improving training and implementing the Commission's Policy Statement. While significant training improvements have been observed, training deficiencies and weaknesses have been identified through staff inspection and review activities in both accredited and nonaccredited training programs. Deficiencies of the type identified are to be expected given the magnitude of the effort involved and the difficulty in implementing performance-based concepts by an industry that until recently based training on NRC-specific requirements. The transition process has been complicated by questions regarding the differences between NRC and INPO review standards and criteria and by some utility uncertainty about how to meet NRC requirements and still meet INPO's accreditation criteria. On balance, however, the industry's efforts to date to improve training have been successful.

The staff's conclusions regarding future industry training activities can be divided into two categories: (1) improvement and enhancement of the existing accreditation program and (2) extension of the accreditation program to address new, important areas. The examples of improvements in the first category are: applying all elements of the Policy Statement to the training of technical staff and managers during the second round of accreditation; improving the review of training performed by contract trainers by applying the same standards used for utility training; adding emphasis to the analysis element so that all knowledges and skills are identified for the development of complete learning and testing objectives; improving the feedback of operating experience; and developing objective methods to better assess training effectiveness.

The two issues which would require extension of the accreditation program are:

- Expanding the accreditation program to include two additional functional areas - Quality Assurance/Quality Control training and severe accident training for Emergency Response Personnel. QA/QC is an area of increasing concern in the industry and had originally been proposed by the staff in the proposed rule on training (SECY-84-76). INPO, at that time, indicated it would be an area for future consideration. Additional INPO guidelines and planned severe accident training for both shift crews and plant management was discussed with INPO on February 20, 1987, and is summarized in Enclosure 2 of SECY-87-101, April 16, 1987.

- Expanding the accreditation program to ensure that utilities assure that contractor personnel who serve in functions covered by accreditation are qualified and receive training commensurate with the training and qualification of utility personnel. NRC inspectors have frequently requested guidance in this area and have expressed concern that contractor personnel are not as well trained or qualified as utility staff.

Recommendation: The staff recommends that the Commission:

1. Continue to endorse the industry accreditation program and defer rulemaking.

2. Note that the staff will:

   A. Continue to evaluate industry implementation of Training and Qualification of Nuclear Power Plant Personnel as described in the existing Policy Statement.

   B. Work with INPO and the industry to enhance the existing accreditation program to: evaluate and quantify training effectiveness; enhance the Technical Staff and Managers' training; emphasize the importance of task analysis, learning objectives and the evaluation feedback process; and improve contracted training.

   C. Meet with INPO Management to discuss: (1) Accreditation of the additional functional areas of Quality Assurance/Quality Control and severe accident training for Emergency Response Personnel, and (2) Expanding the scope of accreditation to cover utility assurance of the training and qualifications of contractor personnel.

3. Direct the staff to propose a revised Policy Statement on Training and Qualification of Nuclear Power Plant Personnel to incorporate the results of the 2-year trial period and the results of the discussions with INPO.

Victor Stello, Jr.
Executive Director
for Operations

Enclosure:
Independent Evaluation of
Industry Training

Commissioners' comments or consent should be provided directly to the Office of the Secretary by c.o.b. Wednesday, May 27, 1987.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT Wednesday, May 20, 1987, with an information copy to the Office of the Secretary. If the paper is of such a nature that it requires additional time for analytical review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

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Enclosure 1

INDEPENDENT EVALUATION OF INDUSTRY TRAINING

INTRODUCTION

The NRC staff has evaluated licensees' training programs independently to ensure that results are consistent with the goal of the Policy Statement on Training and Qualifications (50 FR 11147), i.e., that the NRC's endorsement of the INPO-managed Training Accreditation Program will result in effective performance-based training in the nuclear power industry. The staff's approach was as described in SECY-85-288. Staff members observed INPO accreditation teams and the Accreditation Board and conducted independent staff reviews of accredited training programs (i.e., post-accreditation reviews). In addition, the staff has compiled information from licensed operator examination reports, inspection reports, Systematic Assessment of Licensee Performance (SALP) reports, and input from NRC regional offices. Although LERs were reviewed, they were not used because they do not include a separate cause code for training; therefore, training as a root cause could not be determined from the data. The results of the staff's evaluation are discussed below.

Post-Accreditation Reviews

The staff has reviewed 20 training programs at 8 sites (Susquehanna, Dresden, Oconee, Salem, San Onofre, Callaway, Arkansas Nuclear One and WNP-2) to evaluate implementation of the 5 elements of performance-based training specified in the Policy Statement. The review findings grouped by Policy Statement element for the 20 programs are:

- Systematic analysis of the jobs to be performed.
    - A systematic method was used to define tasks performed on the job at 18 of the 20 training programs reviewed. Nine of the programs identified knowledge, skills and abilities (KSAs) from these analyses for use as the basis for ensuring completeness of learning objectives and training. Nine programs developed task lists from job analysis which were compared with the content of existing training materials. Of the other two programs reviewed, one was accredited in 1983 based on INPO's training and qualifications guidelines, which was allowable in lieu of formal job and task analysis, and the other was in the technical staff and manager category for which INPO is not requiring a position-specific analysis to establish program content.
    - Only two programs had continuing training needs identified from task analyses, although ratings on importance, frequency, and difficulty of task performance have been identified for the programs at other facilities. These ratings would aid in selecting tasks for continuing training.

° Learning objectives derived from the analysis which describe desired performance after training.

  - Tasks were supported by learning objectives for 16 of the 20 programs. Learning objectives existed for most, but not all, tasks for three other programs, although in some cases, the learning objectives were overly broad. No learning objectives were included in one contracted training program in the technical staff and manager category.

  - The majority of learning objectives reviewed described expected trainee behavior in terms of conditions, actions or standards governing successful task performance. In some cases, learning objectives were too broad and did not provide a consistent basis for trainee evaluation.

° Training design and implementation based on learning objectives.

  - The training organizations' goals and objectives, as well as the responsibilities of training organization personnel, were stated in writing at all facilities reviewed.

  - Qualification and training requirements for the training staff were found to be adequate although several were not formalized by procedure.

  - Careful selection of training methods and media was in evidence at all facilities. The organization and sequencing of initial training programs were generally based upon the relationship among learning objectives.

  - Lesson plans at all facilities provided for consistent training delivery, and both simulator and classroom training observed during the reviews were found to be well conducted.

  - All facilities had adequate methods for maintaining training records.

° Evaluation of trainee mastery of the objectives during training.

  - Exemptions from training at all but one facility were derived from performance-based testing or other objective evaluation methods, e.g., previous experience.

  - Appropriate procedures for development of trainee tests and standards of performance were available and implemented at all utilities.

- In 16 of the 20 training programs reviewed, test items could be linked to task lists and learning objectives. In one program, the learning objectives were too broad to determine if an effective linkage existed. Examinations were not available for review for one contracted training program in the technical staff and manager category. In the remaining two programs, test items covered classroom learning objectives; however, the criteria for trainee evaluation during simulator training consisted of broad objectives with only informal mechanisms for evaluation and feedback of specific task performance problems.

- Criteria for evaluation of on-the-job training (OTJ) was often too broad.

- All programs had adequate procedures in place to prevent compromise of examinations.

° Evaluation and revision of the training based on performance of trained personnel in the job setting.

  - All sites had procedures in place for effective program evaluation and there was evidence that the procedures were being implemented.

  - Evaluation of examinations and operating test results were performed at all sites, but aggregate analyses, such as item analysis, were not performed at the majority of facilities reviewed.

  - Instructor and trainee critiques were in evidence at all facilities, although they varied both in formalization and extent to which they were used for program evaluation.

  - The staff at all sites were qualified to perform their respective duties as training or subject matter specialists.

  - Internal and external evaluations were performed at all sites on a regular basis.

  - On-the-job experiences and feedback were solicited from job incumbents and supervisors at most facilities. Most facilities have formal mechanisms for evaluation of trainee performance after training to provide feedback from operations to the training department.

  - Most programs need to improve methods to ensure that training programs remain current and timely as job performance requirements change (e.g., as plant equipment and procedures are changed).

Operator Licensing Examination Results

The impact of accreditation on licensing examination performance was assessed through analysis of pass/fail rates on the written and operating (i.e., oral and simulator) portions of the NRC examination. The results of the analyses for FY 1985 and for the time period extending from FY 1986 through the end of calendar 1986 are as follows:

FY 1985

BWR Plants	No. Plants	No. Candidates	Pass Written	No. Candidates	Pass Operating
Accredited	7	88	86%	96	93%
Nonaccredited	21	357	77%	351	86%
PWR Plants					
Accredited	19	323	84%	309	88%
Nonaccredited	29	349	90%	324	95%

FY 1986 - December 1986

BWR Plants	No. Plants	No. Candidates	Pass Written	No. Candidates	Pass Operating
Accredited	12	145	90%	156	91%
Nonaccredited	19	291	90%	277	90%
PWR Plants					
Accredited	24	382	84%	341	88%
Nonaccredited	24	566	87%	469	89%

No statistically significant differences were found between the examination pass rates of accredited and nonaccredited plants for either time period. Several explanations can be offered as to why the effect of accreditation on training programs cannot be ascertained using operator license candidate examination performance. First, throughout FY 1985 and 1986, most plants were actively engaged in completing the multiple stages leading to receipt of accreditation. Thus, many candidates included under "Nonaccredited" in the tables above are from plants that achieved accreditation shortly after the examination. As such, the impact of accreditation status on NRC examination scores becomes somewhat blurred during this period of transition. Nonsignificant differences may also be a result of timing between completion of training, subsequent NRC examination(s) and accreditation (e.g., candidates at accredited plants may have completed training prior to accreditation). Following implementation of the revisions to 10 CFR 55, the staff's data base will include whether or not the candidate completed an accredited training program.

Requalification Examinations

Differences in pass rates between candidates from accredited and nonaccredited plants on NRC requalification examinations for FY 1985 and FY 1986 are as follows:

FY 1985	No. Candidates	Pass Written	No. Candidates	Pass Oral	No. Candidates	Pass Simulator
Accredited	48	71%	18	100%	18	89%
Nonaccredited	242	77%	121	97%	28	90%
FY 1986						
Accredited	139	78%	128	97%	53	96%
Nonaccredited	96	72%	53	94%	52	90%

Although not statistically significant, there is a marked increase in the performance of candidates at facilities with accredited training programs between FY 1985 and FY 1986. However, this increase is probably due to factors other than application of performance-based training methods to requalification programs because requalification was regulated by 10 CFR 55, Appendix A. Future evaluations should attempt to better measure the relationship between overall requalification examination pass rates and the extent to which the facility follows a program of performance-based requalification training.

Licensed Operator Examination Reports

Examination reports were reviewed for all plants to extract data describing industry training program effectiveness. These reports often identified generic weaknesses found in the written and/or operating examinations. A generic weakness is defined by the operator licensing examiners as a knowledge or performance deficiency evidenced in approximately one-third of the candidates at a facility. The citing of generic weaknesses is intended as feedback to facility training staff.

Generic weaknesses were noted in examination reports of accredited and nonaccredited programs alike. Of the 165 examination reports reviewed over the 2-year period, 103 identified generic weaknesses. Common deficiencies, weaknesses and findings are listed below, in roughly descending order of frequency of occurrence:

° Deficiencies in knowledge and use of procedures, especially abnormal and emergency procedures were cited in almost half of the examination reports. Many candidates displayed weaknesses in knowledge of precautions, entry conditions, immediate actions, use of multiple procedures, and failure to complete and verify procedural steps. The recent transition from event to symptom based emergency procedures may be in part responsible for this frequently cited weakness.

- Knowledge of system operation and system design, including system purpose, location of components, operating limits and parameters and their bases, the effect of malfunctions on systems, understanding system response, and system logic and interlocks was cited in approximately one-third of the reports reviewed.

- Plant reference material, such as lesson plans and system descriptions, were found to be obsolete, deficient, and/or vague in approximately one-third of the reports. Instances of discontinuity between training material and procedural guidance were noted. Further, numerous problems with both hardware and software impeded the use of simulators as a mode of candidate evaluation.

- Deficiencies in interpretation and use of Technical Specifications, including knowledge of bases and definitions was cited in approximately 10% of the reports.

- Candidates exhibited weaknesses in radiation protection knowledge, including facility exposure limits and bases for their determination, sources of radiation, theory of operation of radiation monitoring instruments, and related basic health physics principles.

- Candidates exhibited weaknesses in reactor theory, thermodynamics, and electrical theory, including knowledge of reactivity effects on various plant parameters and the conduct of reactivity calculations (e.g., ECPs, shutdown margin).

- Deficiencies in communication skills and, in the case of senior reactor operator (SRO) candidates, skills in directing control room activity and in knowledge ~~of~~ administrative requirements, procedures, cautions and limitations were also noted in approximately 10% of the reports.

- Classification of events according to the Emergency Plan was a deficiency cited in several of the reports.

- Candidates exhibited weaknesses in their ability to perform tasks that are infrequently encountered, and in knowledge and use of systems outside the control room, such as the operation of the plant from the remote shutdown panel.

- Refueling, including knowledge of refueling equipment, duties, operations, requirements, and refueling system interlocks was a deficiency mentioned several reports.

Summary

There are no statistically significant differences in performance on NRC examinations between accredited and nonaccredited facilities. Since nearly all facilities have their operator licensing programs accredited, the staff may not be able to quantify the effect of accreditation through examination performance in the future. Examination reports describe a variety of generic weaknesses in candidates at both accredited and nonaccredited facilities. These weaknesses are examples of performance deficiencies, which demonstrate that materials provided by utilities to examiners and the NRC examinations are now performance-based, which is the common goal of the industry and the NRC.

NRC INSPECTION REPORTS

NRC inspection reports for CY 1985 and CY 1986 were reviewed to determine the influence of INPO accreditation on training programs at nuclear power plants. Deficiencies, unresolved items, and open items were noted at utilities regardless of accreditation status.

While inspection reports are an appropriate source for determining strengths, weaknesses, and progress of facility training programs, it is difficult to draw comparisions between accredited and nonaccredited programs. The training inspection modules were revised in June of 1985 to be performance-based. However, many of the inspections were not conducted using the revised inspection procedures due to implementation lag and there was considerable variation among regions in the interpretation of these procedures. In addition, although there were far more utilities with accredited programs in 1986, the status of the accreditation effort at the time of the inspection varied considerably across utilities with respect to the specific program(s) inspected.

Some of the findings reported which may not appear to be the result of a performance-based inspection because they relate to programmatic issues were indeed found in performance-based inspections. They are the result of inspectors tracing a performance deficiency identified in the inspection back to the training program.

This summary of inspection findings is organized into five areas; Adminstrative Issues, Training Program Content, Recordkeeping, Instructor Performance and Qualifications, and Training Evaluation. Where applicable, differences between accredited and nonaccredited facilities are discussed.

Administrative Issues. The positive influence of INPO accreditation in the area of administrative issues is evident. However, inspectors continued to identify deficiencies in procedures or their use in the adminstration of training.

The positive findings, identified in 20% of the reports reviewed were:

- Increased administrative oversight of training program development, implementation, and evaluation in accredited programs.
- Increase in attention to training and the improved quality of performance-based training.

The following administrative deficiencies were noted in approximately 20% of the reports reviewed:

- Lack of procedural guidance and management attention or commitment at nonaccredited facilities.
- Failure to follow or implement procedures and guidelines that are in place at accredited facilities.
- Administrative shortcomings directly related to NRC regulations in both accredited and nonaccredited programs.

The majority of administrative deficiencies and open items were related to requalification training and evaluations.

Training Program Content. Although a majority of inspection reports for the 2-year period identified improved quality and detail in lesson plans and other course material in accredited programs, there continue to be weaknesses in the following areas in both accredited and nonaccredited programs:

- Over half of the reports identified inadequate coverage of specific content areas, e.g., trainng to prevent personnel from overtorquing limtorque valve operators, training needed to prevent overloading of emergency diesel generators, ineffective training on containment isolation valves, and inadequate training on recognition of symptoms requiring manual feedwater pump trips during an overcooling event.
- Shortcomings in licensed operator training related to coverage of emergency and abnormal procedures were identified in over 40% of the reports reviewed, i.e., not enough time spent on these procedures; insufficient depth of coverage.
- Deficiencies in the degree of specificity in certain topical areas were identified in over one-third of the reports. In addition, deficiencies were noted in training on technical specifications and procedures, and feedback of design changes, LERs, operational experience and industry events to the training program.

- Lack of training coverage of topics addressed in regulatory requirements and directives was noted in over one-third of the reports reviewed.
- Inappropriate management of time for specific training topics was mentioned in more than 10% of the reports reviewed, i.e., too long an interval between related topics; too little time to cover material.
- Overreliance on self-study was cited in 5% of the inspections.
- Weaknesses or inadequacies in learning objectives were mentioned in a few cases, e.g., objectives that are too broad or not based on appropriate analysis.

Recordkeeping. When documentation was mentioned in inspection reports for the latter part of the 2-year reporting period, it was generally in a positive light, often noting the implementation of new and efficient computerized systems for document maintenance and retrieval. Deficiencies were noted in the following areas:

- Over 10% of the reports identified inadequacies in training record documentation and maintenance, usually involving inaccuracies, records of course attendance and remedial training, examination grades and other measures of student performance.
- A few reports mentioned difficulty in retrieval of information at some utilities regardless of accreditation status.

Instructor Performance and Qualifications. Findings in the area of instructor performance and qualifications were noted in only a few inspection reports. Most of the reports in which this area was addressed identified the following:

- Some instructors either were not SRO-certified or had failed to perform licensed duties for a period of 4 months or greater.
- There were instances of instructors who teach systems, integrated response, transient and simulator courses who were not enrolled in appropriate portions of requalification programs.

In addition, a few of these reports also mentioned:

- Performance by instructors was adequate and effective.
- Instructors were adequately qualified.

Training Evaluation. Inspection reports for the 2-year period identified the following findings related to training evaluation:

- Nearly half of the reports reviewed indicated that a number of satisfactory training feedback mechanisms are in place at both accredited and nonaccredited facilities, e.g., follow-up on detected trainee deficiencies, utility-administered examination preparation and grading, mechanisms for feedback of instructor effectiveness, use of aggregate examination analysis to identify program weaknesses (and also to develop subsequent requalification programs), training needs analysis forms submitted to the training group from operations, and OTJ feedback from supervisors of trainees.
- More than 40% of the reports reviewed addressed various deficiencies in utility-administered examinations, including (1) overly easy or simplistic examination questions; (2) failure to link examination questions to learning objectives; (3) a lack of criteria for passing examinations or other performance measures (oral, written, and simulator); (4) reductions in passing scores on requalification examinations; (5) inaccuracies in examination grading; and (6) breaches of examination security, including inappropriate storage, and repeated administration of the same questions and examinations. In some cases, there were no procedures in place to ensure that grading quality was checked on written requalification examinations which, in turn, resulted in unidentified examination failures.
- In approximately one-third of the reports, deficiencies were noted in the implementation of the above evaluation methods by some licensees for both accredited and nonaccredited programs, such as inadequate communication of LERs and reports of deficient performance to the training group for factoring into training.
- Over 12% of the reports identified shortcomings in programs for remedial training, such as failure to provide such training at individual, group, or programmatic levels.

Summary. In general, the impact of INPO accreditation continues to be reflected in an increase in procedures for training program development, implementation and evaluation. Accreditation also appears to have brought about increased management support and commitment to performance-based training. However, there continue to be weaknesses in training on LERs, operational experience, industry events, plant design changes, Technical Specifications and plant procedures and shortcomings in requalification program implementation. Regulatory deviations and violations were found fairly equally across utilities, regardless of accreditation status.

SYSTEMATIC ASSESSMENT OF LICENSEE PERFORMANCE (SALP)

An additional 39 SALP reports from May 1985 to December 1986 were reviewed for information on licensee training programs and supplements the review of 44 SALP reports discussed in SECY-86-119. It is important to note that SALP rating periods are long, i.e., 12-18 months, so that in some cases (22) the SALP review ended prior to accreditation of any of that utility's programs, while in other cases (17) accreditation had been granted to at least a few of the utility's programs during the SALP reporting period.

The review encompassed information found in the following SALP report categories:

(1) Plant Operations
(2) Radiological Controls
(3) Maintenance
(4) Licensee Activities
(5) Training

These areas were selected for review because performance information related to training programs and job positions covered by INPO accreditation would be contained in these categories. Also, SALP rating criteria (i.e., SALP scores) were not developed specifically for the purpose of evaluating whether performance-based training programs comply with the objectives contained in the NRC Policy Statement on Training and Qualification.

Based on SALP reports, licensee training programs, both accredited and nonaccredited, show evidence of a strong commitment to training. General findings regarding the effects of accreditation on licensee training programs are:

(1) well-staffed training departments,

(2) well-trained plant personnel,

(3) new/improved training facilities equipped with plant-specific simulators and mock-ups.

However, generic training problems continued to be identified in SALP reports involving both accredited and nonaccredited training programs. Problems in recent SALP reports which are similar to those identified in SECY-86-119 are:

- Understanding of procedures and inadequate training on procedures were reported in over 50 percent of the SALP reports reviewed.

- In approximately 30 percent of the SALP reports, lack of management attention at some facilities to licensed operator requalification training, including failure to establish or implement adequate training procedures, failure to maintain adequate training records, evidence of poor requalification training and high failure rates on NRC requalification examinations was noted.
- Maintenance training was described as not nuclear specific or provided in sufficient detail in about 20 percent of the SALP reports. This led to problems such as inadvertent operation of equipment including actuation of Engineered Safety Features (ESF) while performing maintenance or trouble-shooting.

Problems which were newly identified and occurring less frequently (10-20%) in SALP reports from May 1985 to December 1986 include:

- The need for more management attention to improve performance of plant-specific simulators and need for improvement of simulator training.
- Lack of recognition or understanding of Technical Specifications.
- Operator unfamiliarity with equipment status during abnormal plant conditions and events.
- Lack of plant experience or plant-specific training for contractor personnel.
- Failure to consistently perform thorough reviews of operational events for feedback into the training program.
- Adequacy of OTJ training programs.

In conclusion, SALP reports indicate that accreditation is having a positive effect on improving training. However, problems in performance of a variety of operating activities involving trained personnel and weaknesses in training program administration and content continue to be noted as weaknesses in SALP reports.

REGIONAL EVALUATIONS OF INDUSTRY TRAINING IMPROVEMENTS

Each region has provided comments on the effectiveness of industry training under the NRC Policy Statement on Training and Qualification. To summarize, the improvements noted in the comments from the regions with respect to accreditation of training are primarily in the area of adminstrative oversight and management commitment of both human and financial resources. None of the regions was able to point to direct casual relationships between accreditation and improvements in training, yet they offer the opinion that training has improved since the accreditation effort. They indicate that more time is needed to make a definitive judgment because of the short time that some accredited programs have been implemented and because very few facilities have all their programs accredited. Some concerns which were expressed regarding accreditation are: Accreditation was felt to have some negative impact because nonlicensed training was neglected while the training staff was occupied with the accreditation effort, accreditation has not had a positive impact on chemistry and radiation protection training, INPO has no timely mechanism for follow-up to confirm accreditation commitments and some plants have failed to implement their accredited program, training of contractors is not addressed by INPO, and there is no analysis for training of technical staff and managers.

QUESTION 33. The Commission has indicated in testimony before the Subcommittee on October 20, 1987, that for a policy statement to be effective, it must be aggressively monitored and evaluated by the NRC. Please detail what efforts the NRC has made or plans to make to monitor and/or evaluate industry efforts in the area of training.

ANSWER.

See the responses to Questions 28.(C) and (F), above. The NRC staff has conducted and will continue to conduct regular training inspections and issue Examination Reports. Senior NRC executives have attended and will continue to attend meetings of the INPO Accreditation Board. In addition to the nine post-accreditation reviews already completed, the staff will continue to perform additional reviews using the criteria in NUREG-1220.

QUESTION 34. If the Commission has conducted an evaluation of industry initiatives in the area mentioned above, what has been the results of such evaluation?

ANSWER.

The staff has conducted a 2-year evaluation of industry initiatives (SECY 87-121) and has found that significant progress has been made in improving industry training and implementing the Policy Statement. Because of the magnitude of the effort, however, staff inspection and review activities continue to identify weaknesses and deficiencies in accredited and non-accredited training programs alike. The staff has recommended that all the elements of the Policy Statement be applied to all training programs presently included in the accreditation program. The staff is discussing its recommendations with INPO.

QUESTION 36. What is the pass rate for NRC-administered requalification examinations for operator licensing? If the pass rate for utility-given requalification examinations is higher different from that for NRC-given examinations, what has the NRC determined to be the reason for discrepancy in pass rates?

ANSWER.

In the past the NRC did not maintain records on the pass rate for requalification examinations, because NRC evaluated only the requalification program and not the operator. In the future, information on the pass rate will be available on the NRC-administered requaliffcation examinations, because the change to 10 CFR 55 requires each operator to pass an NRC-administered requalification exam some time during the 6-year term of his/her license as a prerequisite to NRC renewal of his/her license.

The staff has no information at the present time on the pass rates for utility-given requalification exams versus those for NRC-given requalification exams. With the requalification examination methodology that is being developed, this information will be available in the future.

QUESTION 38: What enforcement actions, if any, are available to the NRC if a licensee fails to establish a program for ensuring that its employees are not coming to work under the influence of alcohol? Please explain the legal basis for your answer.

ANSWER:

In the absence of a specific requirement, the Commission may take enforcement action in the form of issuing an order under Section 161 of the Atomic Energy Act. Although there is no specific regulatory requirement to establish a program for ensuring that licensees' employees do not come to work under the influence of alcohol, the NRC can take enforcement action under Section 161 of the Atomic Energy Act where NRC finds that a failure to establish such a program necessitates such action to "protect health or to minimize danger to life or property." 42 U.S.C. 2201(b) Whether or not a licensee has established a program, the NRC could issue an order for modification, suspension, or revocation of the license if public health and safety required such action to address a fitness for duty issue.

QUESTION 39. In 1985, the NRC staff developed a maintenance and surveillance plan to survey the status of maintenance in the nuclear power industry.

(A) Considering that nuclear power plants have been operating since the late 1950's, why did it take so long for the NRC to review the maintenance status of the industry?

ANSWER.

Before 1985 the NRC addressed maintenance activities through a number of discrete NRC regulations, Regulatory Guides, and inspection procedures. The regulations, existing then as well as at the present time, address maintenance through the surveillance program (10 CFR 50.36), the inservice inspection and inservice testing programs (10 CFR 50.55a), the general design criteria (10 CFR Part 50, Appendix A), and quality assurance criteria (10 CFR Part 50, Appendix B). The Regulatory Guides on quality assurance (RG 1.33) and on training (RG 1.8) also address some aspects of maintenance. In its inspection program, the NRC uses a number of maintenance inspection procedures. The existing regulations pertaining to maintenance are summarized in NUREG-1212, Volume 1, Appendix B.

On the basis of operating experience, the staff and the Commission decided that a more aggressive regulatory approach toward maintenance was needed. A number of facts supported this decision. For example, as of 1985, more than 35% of the nuclear power plant abnormal occurrences reported to Congress were attributed to maintenance factors, with the trend increasing as more plants became operational. A review of operating experience showed a high frequency of degraded system performance as a result of both the lack of maintenance (especially preventive maintenance) and improperly performed maintenance, including human error during repair and surveillance testing. One NRC study showed that 70% of the events involving wrong unit or wrong train were attributable to human error during maintenance. Numerous maintenance errors were described by Licensee Event Reports (LERs) and the Nuclear Plant Reliability Data System (NPRDS). The review also found that many challenges to safety systems originated in systems or components that were not classified as safety related.

Since 1985, major changes in maintenance have taken place in the industry. Many licensees have reorganized their maintenance departments; started new, long-term improvement projects; or revised their maintenance programs. Many industry organizations have developed initiatives designed to improve maintenance; some of these involve all licensees while others are aimed at specific aspects of maintenance at selected sites.

Therefore, for all these reasons, the NRC initiated and developed the maintenance and surveillance plan to survey the status of maintenance in the industry on a current basis.

QUESTION 39. (continued) - 3 -

(B) Specifically, what were the purposes of the maintenance survey?

ANSWER.

The primary objective of the survey was to obtain a comprehensive assessment of licensees' maintenance activities to determine the adequacy of the existing regulations for nuclear power plants that had gone from the construction phase into the operating phase. The findings of the survey were published in the report, "Status of Maintenance in the U.S. Nuclear Industry, 1985". (NUREG-1212, Vols. 1 and 2).

QUESTION 39. (continued) - 4 -

(C) What were the findings and recommendations resulting from the survey?

ANSWER.

The results of the survey were published in "Status of Maintenance in the U.S. Nuclear Industry, 1985," NUREG-1212, in May 1986. Volume 1 of the report provides a summary of the findings; Volume 2 contains the specific findings in detail. (See attachment for the Executive Summary, Volume 1, NUREG-1212 for the findings and recommendations of the survey.)

Attachment:
Executive Summary

1/27/88 BREAUX Q39

QUESTION 39(C) Attachment

EXECUTIVE SUMMARY

This report presents the major findings, conclusions, and recommendations resulting from Phase I of the NRC Maintenance and Surveillance Program (MSP). The purpose of Phase I, as described in the Maintenance and Surveillance Program Plan (MSPP) (SECY-85-129), was to survey the current status of maintenance in the U.S. commercial nuclear power industry. To accomplish this objective, a program of activities was designed to collect and analyze maintenance data and information and to coordinate NRC and industry initiatives related to maintenance. A summary of major findings, conclusions and recommendations arising from these activities follows.

Trends and Patterns in Maintenance

Actual plant performance data, based upon information reported to NRC, have been found useful to monitor overall industry maintenance performance. Trends and patterns in plant maintenance performance between 1980 and 1985 were studied using 31 measures of plant performance. Although measures of plant performance from 1980 to 1985 show some improvement in overall plant performance, there are still a significant number of reliability problems that warrant attention by the NRC. Overall plant system/component reliability has improved since 1980 as shown by a decline in average numbers of forced outages experienced by the nuclear industry. However, component failure forced outages continue to comprise over 60% of forced outages, indicating component reliability problems which could be attributable in part to maintenance.

Safety system reliability for all the plants has not significantly changed since 1981, as determined from annual average numbers of LERs. A significant increase in the percentage of maintenance-related LERs from 1984 to 1985 was observed. In fact, 48% of the total number of 1985 LERs are maintenance related. Challenges to safety systems, as measured by average total numbers of scrams, have declined between 1980 and 1985. However, scrams due to maintenance and testing did not significantly decrease between 1980 and 1985. The percentage of engineered safety features (ESF) actuations due to maintenance, surveillance, and component failure was about 75% of total ESF actuations in 1984 and 1985, indicating that a significant challenge to plant reliability and safety can be attributed to maintenance-related activities.

Industry plant average radiological exposure data show no statistically significant improvement trend since 1980 according to NUREG-0713, Occupational Radiation Exposure at Commercial Nuclear Power Reactors. Radiological personnel exposures due to maintenance represented 46% of the total exposures in 1984.

Quality programs and surveillance SALP ratings improved between 1980 and 1985 while operations SALP and maintenance SALP ratings have not changed significantly.

Taken together, these measured trends in plant performance show overall improvement since 1980. However, it is important to note that a significant portion of measurable reliability problems in terms of forced outages, LERs, and ESF actuations are attributable to maintenance, surveillance or component failures and have not shown significant improvement. While overall trends are positive, there is a need to improve performance of maintenance and surveillance in order to reduce challenges to safety systems and improve safety systems availability and reliability.

Current Status of Maintenance

As determined from 8 plant site visits and questionnaire responses from 66 Resident Inspectors, there is wide variability in plant maintenance programs and practices. Industry maintenance programs are undergoing many changes; reorganizations are taking place and major new programs are being initiated. Maintenance programs and practices at some plants appear to differ considerably from the tendencies of the rest of the industry.

Maintenance is now a separate organization at most plants, responsible for planning and scheduling their own electrical, mechanical, and I&C maintenance work. While most plants are found to have some form of a preventive maintenance program, one-fourth of the programs appear to be minimal. The maintenance staff at the majority (70%) of the plants spend one-fourth or less of their time on preventive maintenance tasks. Scope and coverage of preventive maintenance programs in the U.S. nuclear industry vary widely but appear to be less extensive than in some other countries (e.g., Japan) and other industries (e.g., aviation industry).

Most of the industry is collecting maintenance performance data and reporting it to INPO. However, many plants also report having difficulty correlating the performance measures with specific maintenance practices. Most plants are not well-equipped to do extensive formal equipment trending and analysis. Use of automated systems for data management, trending, and analysis is a changing aspect of most plant maintenance programs.

According to the Resident Inspector questionnaire responses, adequacy of workshop space and equipment laydown areas is a problem at some plants and spare parts availability appears to be a problem at all but a few plants.

The majority of plants have not yet received INPO accreditation of their electrical, mechanical and I&C training programs. Only about one third of the plants appear to have formal maintenance personnel training covering plant modifications or requalification training programs.

Work order preparation and spare parts inventory control systems are completely manual systems in some plants while other plants are moving toward computerized systems. There is a great variability in the quantities of work orders backlogged among plants. Site surveys indicated that the work order backlog ranged from 2-4 weeks up to 6 months. Most plants have a decreasing or constant trend in work order backlog.

Quality control of maintenance work activities varies widely. While most plants limit quality control activities to only safety-related work, a few plants do use comprehensive quality control of both safety and nonsafety-related work.

Implications of NRC and Industry Maintenance Initiatives

NRC and industry maintenance initiatives were not well coordinated before Phase I of the MSPP. Both NRC and industry have made significant contributions to a better understanding of maintenance issues during the last year.

NRC and industry initiatives related to equipment aging and performance are producing equipment-specific data and techniques. These programs provide important data for effecting improvements in equipment reliability. Compatibility and usability of the results of component performance studies could be improved by focusing on common goals for reliability.

Most of the NRC and industry studies of factors affecting human error and personnel performance in maintenance focus on individual causative factors or events resulting from errors. The complex relationships among factors influencing human performance are still not well known or extensively investigated. The well-documented high contribution of human error to reportable events and to risk warrants identification of means to improve human reliability. Improvement strategies currently focus on personnel training as a means to improve human reliability. A study of maintenance procedures documentation, use, and control revealed wide variability in the quality of maintenance procedures in the industry with the potential to impact safe plant operations.

The role of management and organization in nuclear plant maintenance is less well defined in the U.S. nuclear power industry than in some other countries (e.g., Japan). Although the role of management is repeatedly emphasized in event follow-up investigations, the current regulation of maintenance does not provide a sufficient basis for defining maintenance and reliability goals for use by management.

The NRC has been actively participating in and encouraging development and use of industry standards for maintenance. It is still unclear what integration problems may arise from implementation of diverse standards addressing various equipment and activities. There is no widely implemented programmatic guidance for maintenance. The diverse industry-developed standards and guidance need integration to ensure reliable maintenance. The effect of INPO guidelines (INPO 85-038) for maintenance programs published in October 1985 is not yet visible.

The maintenance and operations interface has not been extensively addressed by NRC except in the context of human errors during maintenance. Identification of improved surveillance and test methods may allow for better coordination of maintenance and surveillance testing activities. NRC activities related to quality of operations and maintenance are currently focused on distinctions between classifications of equipment and activities rather than on performance goals.

Conclusions

The trends and patterns analysis of industry maintenance performance clearly indicates that although overall industry reliability appears to be improving (as shown by declining forced outage and scram rates) maintenance continues to be a significant contributor to industry reliability problems (as much as 75% by some measures). This contribution of maintenance to reliability problems indicates that some maintenance programs and practices are not effective.

Results of Phase I of the maintenance and surveillance program confirm that problems identified in the MSPP are indeed evident throughout the nuclear industry. That is, that:

- needed maintenance is not being accomplished or is not performed effectively;
- a high percentage of failures result from improper performance of maintenance;
- the maintenance and operations interface is inadequate;
- maintenance-related activities are responsible for a significant number of challenges to safety systems; and
- a major portion of occupational radiation exposure to personnel results from maintenance.

Phase I findings also confirm that there are wide variations in maintenance practices among utilities and that many licensees are implementing changes in their maintenance programs to address identified problems. Further, industry has established a variety of programs aimed at self-improvement. However, NUMARC and INPO initiatives which address industry maintenance problems are still in their infancy. While many changes are taking place in industry maintenance programs and practices, improvement efforts do not appear to be well integrated or effectively implemented in some cases. While industry improvements in overall performance are evidenced by measurable trends, maintenance performance is not measurably improved. The contribution of any specific causal factor (e.g., INPO or NRC initiatives) to performance trends observed cannot be inferred at this time. Therefore, improved objective and reliable measures of plant performance are needed.

To solve these problems, several NRC and industry actions should be taken:

- Improve development and use of measures of plant performance and safety;
- Determine the contribution of human performance in maintenance to plant reliability and identify the safety impact of alternative strategies for improving human reliability;
- Define maintenance needs, including the role of preventive maintenance, for achieving acceptable levels of reliability and safety;
- Define goals for nuclear power plant reliability and safety that foster management involvement in ensuring effective operations and maintenance, including the use of performance measures and incentives;
- Develop and implement performance-oriented maintenance criteria and standards;
- Identify approaches to maintenance which enhance the interface between maintenance and operations and ensure reliability and safety; and
- Coordinate NRC and industry initiatives related to maintenance.

Resolution of the issues identified by the MSPP and Phase I initiatives will be addressed during Phase II of the MSPP.

QUESTION 40. During his testimony before the Subcommittee, Mr. Stello called the Subcommittee's attention to the standard technical specifications applying to the so-called "safety systems" of a nuclear power plant. Mr. Stello said that when the NRC issues the specifications as part of a license condition it has the force of a regulation.

(A) Explain the distinction between those parts of a nuclear power plant which comprise the "safety systems" and those parts comprising the "balance of plant."

ANSWER.

"Safety systems" are those systems that are relied upon to remain functional during and following design basis events to ensure:

1. The integrity of the reactor coolant pressure boundary, or
2. The capability to shutdown the reactor and maintain it in a safe shutdown condition, or
3. The capability to prevent or mitigate the consequences of accidents that could result in potential offsite exposures comparable to the 10 CFR Part 100 guidelines.

The term "Balance of plant" (BOP) is normally considered to mean those parts of the plant that are not directly associated with the reactor and its emergency systems; i.e., not designed and provided by the reactor vendor.

QUESTION 40. (continued) - 2 -

The terms "safety system" and "balance of plant" are not mutually exclusive. Some BOP systems are "safety systems"; for example, the stand-by gas treatment system that supports safety function #3 above.

QUESTION 40. (continued) - 3 -

(B) Considering that the NRC has license condition documents for each operating reactor having the force of regulations, why cannot similar documents exist for "balance of plant" areas? Explain why the NRC is considering a policy statement for "balance of plant" areas, which have no force of regulation, instead of a document which is fully enforceable? Is having enforceable documents for "balance of plant" areas less important than having enforceable documents for "safety systems?"

ANSWER.

The NRC inspection and enforcement programs endeavor to encourage corrective actions at facilities, if needed for safety, regardless of whether the problem relates to "safety systems" or "balance of plant." NRC policy is to issue fully enforceable requirements for those structures, systems, or components that are necessary to ensure the health and safety of the public. Some enforceable requirements, in the form of regulations and license conditions, exist for specific "balance of plant" systems that the staff has determined are also important to the safe operation of nuclear power plants. Examples include fire protection systems and security systems.

QUESTION 48. Please provide a listing of the 12 technical matters mentioned on Page 2 of the NRC prepared statement dated October 8, 1987, which OIA has referred to the Executive Director for Operations in the past 2 years.

ANSWER.

The 12 technical matters referred to the Executive Director for Operations (EDO) by OIA during FY 86 and FY 87 which were mentioned by OIA Director Sharon R. Connelly during the October 8, 1987, hearing are listed below. Since October 8, 1987, OIA has referred two additional memoranda documenting technical matters for the EDO involving physical security issues at South Texas Nuclear Project and a variety of issues at the Hope Creek Nuclear Generating Station and Shoreham Nuclear Power Station.

FY 1986

	Plant/Utility	Technical Issue	Date
1.	Sequoyah, Watts Bar, Bellefonte, and Browns Ferry - Tennessee Valley Authority (TVA)	Problems with TVA's Corrective Action System - Information Involving Multiple Engineering Issues	01/86

QUESTION 48. (continued) - 2 -

2.	Sequoyah and Watts Bar - TVA	Problems with Design Changes at TVA Plants	01/86
3.	Watts Bar I and II - TVA	Human Factors Issues	06/86
4.	Diablo Canyon I - Pacific Gas and Electric Company	Retention of Design Records	06/86
5.	Catawba II - Duke Power	Problems with Safety Equipment During Harsh Environmental Conditions	06/86
6.	Watts Bar I & II and Bellefonte I & II - TVA	Cable Installation Problems	09/86
7.	Sequoyah Fuels Plant - Kerr McGee Corp.	Radiation Control Problems	09/86

FY 1987

	Plant/Utility	Technical Issue	Date
1.	Byron II - Commonwealth Edison	Design Tolerance Problems at Byron	02/87
2.	Fort St. Vrain - Public Service of Colorado	Design and Construction Concerns	04/87
3.	Perry I & II - Cleveland Electric Illuminating Company	Material Control Issue	05/87
4.	Fort St. Vrain - Public Service of Colorado	Design and Construction Concerns	06/87
5.	Watts Bar I & II and Bellefonte I & II - TVA	Cable Installation Problems	09/87

QUESTION 61. Has the Commission ever halted an OIA investigation? If so, please specify the allegation which was to have been investigated and please explain the reasons why the Commission ordered the investigation halted.

ANSWER.

OIA has no record of, and the current employees of OIA do not recall, any OIA investigation halted by the Commission.

QUESTION 74. What proportion of the information utilized by the Commission in its licensing and/or regulatory decisions comes from licensees? What percentage comes from Commission staff?

ANSWER.

The NRC receives the vast majority of the information utilized in its licensing/regulatory decisions from licensees. A small percentage of information used in these decisions is generated by the staff, through inspections, investigations, research, staff reviews and analyses, studies by independent consultants, and whatever other actions may be necessary to confirm NRC's understanding of the information submitted by licensees.

QUESTION 77. Did the Backfit Rule increase the Commission's substantive authority under the Atomic Energy Act to order backfits?

ANSWER.

No. Of course, the Commission could not, by a rule, increase the authority given to it by Congress. Nonetheless, the Backfit Rule and the statement of considerations which accompanied its promulgation do assert, perhaps more clearly than any document before them, that the Commission has the authority under the Atomic Energy Act to require safety measures beyond those required by the "adequate-protection" standard of section 182(a) of the Act. Moreover, in the litigation over the backfit rule, this authority received its first judicial recognition. In the litigation, both the Union of Concerned Scientists and the Atomic Industrial Forum asserted, for different reasons, that the Commission could require only adequate protection. The Court, however, ruled otherwise:

> If it so desires, ... the Commission may impose safety measures ... over and above those required by section 182(a)'s adequate-protection standard. ... [S]ection 161 of the Act empowers the Commission to issue rules, regulations, or orders to "protect health or to minimize danger to life or property." 42 U.S.C. § 2201(b), (i). ... We ... view section 161 as a grant of authority to the Commission to provide a measure of safety above and beyond what is "adequate." The exercise of this authority is entirely discretionary. If the Commission wishes to do so, it may order power plants already satisfying the standard of adequate

> protection to take additional safety precautions. When the Commission determines whether and to what extent to exercise this power, it may consider economic costs or any other factor. ...

UCS, et al. v. NRC, 824 F.2d 108 1987 (slip opinion at 22).

QUESTION 78. Did the Backfit Rule impose new limitations, substantive or procedural, upon the authority of the NRC under the Atomic Energy Act?

QUESTION 79. If so, why did the Commission impose such limitations upon its authority?

ANSWER.

The Backfit Rule did not impose new limitations on the Commission's authority under the Atomic Energy Act. Of course, just as the Commission cannot by rule increase its authority (see our Answer to Question 77), neither can it by rule decrease it. What the Backfit Rule did do, however, was establish, with respect both to procedure and to substance, the standards the Commission intended to abide by in exercising its authority to backfit safety requirements.

There was general agreement before the revised rule was promulgated that the original version of the rule, which had been in effect since 1970, had not provided the necessary discipline to the backfitting process. The principal reason for promulgating the 1985 revised backfit rule was that "documentation in too many cases ha[d] been non-existent or inadequate to identify and justify the safety and cost consequences of past NRC-imposed backfits." See, e.g., 50 Fed. Reg. 38097, 38104, col. 1 (September 20, 1985) (final rule). The General Accounting Office even concluded that there had been cases of backfits that had "resulted in questionable safety benefits." Nuclear Regulation: Process for Backfitting Changes in Nuclear Plants Has Improved, GAO/RCED-86-27, at 37, 7-43 (December 1985). Even critics of the rule acknowledged the problems it was designed to solve. Former Commissioner Asselstine, for instance, said there had been some instances in which the NRC staff had "required changes to plants that are costly and of dubious safety value." 49 Fed. Reg. 47034, 47039, col. 2 (November 30, 1984) (proposed rule). The Union of Concerned Scientists (UCS), too, said that poorly managed backfitting "may both result in unnecessary costs and be detrimental to safety" and concluded that "[m]anagement should be made more efficient, and the Staff should be made accountable for its positions." See "Comments of the Union of Concerned Scientists on Proposed Revision of the Backfitting Process for Power Reactors, ANPR 48 Fed. Reg. 44217", at 13. The UCS also said that the staff should be required "to justify all backfits.... [T]his requirement ... would contribute to rational decisionmaking." Id. at 20-21, 28-29.

In order to contribute to rational decisionmaking in the backfitting process, the 1985 revision of the Backfit Rule did principally five things, none of them limitations on the Commission's authority. First, it retained the 1970 rule's requirement that backfits beyond adequate protection provide "substantial" additional protection. This standard was not challenged in the backfit litigation in the Court of Appeals.

Second, the 1985 Rule added cost as a consideration in cases where the plant already provided adequate protection, because "[w]ithout cost as a competing consideration in these circumstances, the regulatory process takes on the characteristics of a quest for a risk-free plant -- an unreasonable objective contrary to the overall intent of the Atomic Energy Act and the public interest." 49 Fed. Reg. at 47036, col. 2 (proposed rule). No Commissioner maintained that cost did not have a proper role in backfitting decisions. As noted in our answer to Question 77, the Court in the backfit litigation affirmed this aspect of the rule. See UCS v. NRC, 824 F.2d 108 (slip opinion at 22), quoted in the Answer to Question 77.

Third, the 1985 Rule contained more provisions for exemptions from its substantive standards. The 1970 Rule waived the requirement for a substantial increase in protection whenever the backfit was required in order to bring a plant into compliance with the Commission's requirements. The 1985 Rule, however, waived both its "substantial increase" standard and its cost-justification standard for any backfit required for compliance's sake or for adequate protection. Thus the Rule provided that, where adequate protection was at stake, cost was not to be a consideration even in a case where a plant was already in compliance with Commission requirements.

Fourth, the 1985 Rule required that certain health and safety factors be considered before a backfit was imposed. These factors included the radiological exposure suffered by workers who would implement the backfit and the impact of the backfit on the complexity of the plant. These are factors no rational backfitting decision can overlook. Fifth and last, the 1985 rule gave responsibility for managing the backfitting process to the Executive Director of Operations. The Commission hoped that this centralization would help assure that the agency's backfitting decisions would form a documented, reasonable, and consistent body which demonstrably contributed to the public health and safety.

QUESTION 80. Since promulgation of the latest version of the backfit rule in 1986, how many generic backfits has the Commission ordered? How many site-specific backfits has the Commission ordered?

ANSWER.

In March 1986, in response to House Report 99-195, the NRC issued its first report to Congress on "Changes to Systems, Components, Structures, Procedures, Organization or Design of Operating Power Plants Imposed by NRC." This report listed four generic backfits and one plant-specific backfit imposed during calendar year 1985. In February 1987, the NRC issued the report for calendar year 1986; this report listed five generic backfits and two plant-specific backfits imposed by NRC. The report for calendar year 1987 has not yet been published; however, it is expected that it will list eight generic backfits and one plant-specific backfit imposed during calendar year 1987.

QUESTION 81. If cost were not a factor, how many additional backfits would have been ordered?

ANSWER.

For generic backfits, if cost were not a factor at all in identifying and evaluating proposed generic backfits, more backfit proposals might have been identified and submitted for evaluation during the period following adoption of the Commission's backfit rule. It is impossible to estimate with any certainty what might have resulted under those or any other assumed circumstances. With regard to the proposed generic backfit packages that actually were submitted and evaluated during that period, none were rejected because of unfavorable cost-benefit results. Typically, some specifics of each approved backfit package were modified during the internal review and evaluation process, because specific details of the initial proposal could not be justified as either safety benefit or as cost-beneficial. However, these are not regarded as rejected backfits.

For plant-specific backfits, one backfit to Oconee 1, 2, and 3 was not imposed because of an adverse cost benefit analysis. This backfit involved upgrading the emergency feedwater (EFW) system to meet current seismic design criteria. NRC's acceptance of the EFW system seismic qualification was documented in a Safety Evaluation Report transmitted to the licensee on January 14, 1987. The licensee demonstrated adequate post-seismic event decay heat removal capability by committing to correct identified deficiencies in the seismic qualification of the EFW system itself and demonstrating that there was adequate seismically qualified alternative capability if the EFW system is lost as a result of seismically induced flooding. The staff performed a quantitative probabilistic evaluation using the information contained in the Oconee Probabilistic Risk Assessment study.

The results of the staff analysis indicated that adequate core melt protection has been provided and no further plant improvements to correct seismic flooding concerns are considered cost beneficial or are warranted.

CHAIRMAN

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

March 1, 1988

The Honorable John Breaux, Chairman
Subcommittee on Nuclear Regulation
Committee on Environment and Public Works
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I am enclosing answers to the following questions contained in your January 27, 1988 letter: 37, 51, 54, 56, 57, 58, 62, 66. 67(A), 69, 72.

I will forward the remaining responses in a separate letter.

Sincerely,

Lando W. Zech Jr.

Lando W. Zech, Jr.

Enclosures: As stated

cc: Sen. Alan K. Simpson

QUESTION 37. The Commission has testified that it is the NRC's decision as to what licensee training programs should contain. What documents contain the NRC's requirements for training programs which are binding on licensees.

ANSWER.

Requirements related to training program content are contained in 10 CFR Part 55, Operators' Licenses. This rule details the required contents of licensed operator requalification programs as well as the knowledge and skill areas required for initial licensing. Further, Regulatory Guide 1.8-1987, which endorses American Nuclear Society standard ANS-3.1-1981, describes an acceptable training program to meet existing requirements. However, both the recently published (March 25, 1987) revision to the rule and the Regulatory Guide provide for alternative training programs which are performance-based and accredited by the National Nuclear Accrediting Board.

Licensees also describe their training programs in their Safety Analysis Report (SAR), which is reviewed by the staff using criteria in the Standard Review Plan (NUREG-0800). The training program described in the SAR is a utility commitment which the NRC can enforce under 10 CFR Section 50.54(i-1) and 50.59. However, utilities which certify that they have a training program which is performance-based and accredited by the National Nuclear Accrediting Board may elect to remove the details of their training program from their SAR. In these cases, the requalification program would continue to be enforceable under 50.54(ii). If the Commission believes that initial training is inadequate, its recourse is to deny an operator a license under Part 55.

1/27/88 BREAUX Q37

QUESTION 51. The Director, OIA, in testimony before the Subcommittee on October 8, 1987, testified that she thought there existed potential for the Commission to restrict OIA's investigative activities but that from a practical standpoint she didn't think the Commission would require OIA to terminate an assignment. Please explain what practicalities preclude the Commission from requiring OIA to terminate an investigation.

ANSWER.

OIA reports to the full Commission; therefore, absent statutory language to the contrary, the Commission has the authority to direct OIA to terminate an investigation. However, a direction from the Commission for OIA to terminate an investigation would require the approval of at least three Commissioners. This significantly reduces the potential for terminating an investigation. Furthermore, Commission actions are scrutinized by the Congress and the media, among others, and termination of an investigation would likely be identified and questioned by interested parties outside the agency. Lastly, OIA always has the option of reporting a matter to the Department of Justice even if OIA is prevented from conducting an investigation.

1/27/88 BREAUX Q51

QUESTION 54. The Director testified on October 8, 1987, that she believed that, "there are no organizational impairments to the effective and efficient operation of OIA." Do you believe that the fact that the Director of OIA reports to, and is hired, and may be fired by the Commission would be an organizational impairment to an effective investigation of wrongdoing by a Commissioner and/or his staff? If not, please explain why not.

ANSWER.

Standards for investigators are provided in the President's Council on Integrity and Efficiency's publication entitled "Interim Quality Standards for Federal Offices of Inspector General." The second general standard states:

> In all matters relating to investigative work, the investigative organization must be free, both in fact and appearance, from impairments to independence, must be organizationally independent, and maintain an independent attitude.

The "Interim Quality Standards for Federal Offices of Inspector General" also state:

> This standard places upon agencies, investigative organizations, and investigators the responsibility for maintaining independence, so that judgments used in obtaining evidence and conducting interviews and making recommendations will be impartial and will be viewed as impartial by knowledgeable third parties.

1/27/88 BREAUX Q54

QUESTION 54. (Continued) - 2 -

Specifically, the standard for Organizational Impairments is:

> An investigative organization's independence can be affected by its place within the structure of the government entity of which it is a part. To help achieve maximum independence, the investigative function or organization should be organizationally located outside the staff or line management function of the unit under investigation or whose employees are under investigation. The investigative organization should report to the head or deputy head of the government authority to refer investigations to the appropriate prosecutive authorities and top management without fear or censure.

We do not believe OIA's independence is affected by its place within the structure of NRC. Consistent with the standards, OIA reports to the head of the agency (the Commission) and is outside the staff or line management function of all NRC organizations except the Commission. Furthermore, an informal survey of 14 statutory offices of inspector general (IG) showed the majority of inspectors general are rated by the agency head or person next in charge:

IG is rated by agency head	6
IG is rated by person next in charge	4
IG is not rated	3
Unable to obtain response	1

QUESTION 54. (Continued) - 3 -

NRC's structure is different from that of most agencies because it does not have a single administrator, whose individual decision could directly affect the status of the Director, OIA. Action in regard to OIA or its Director requires approval by three or more Commissioners; therefore, a Commissioner under investigation or whose staff is under investigation, cannot independently take adverse action. As a result, there is little that a Commissioner who is under investigation, or whose staff is being investigated, can do to impair the work performed by the Director, OIA, or her staff.

If the situation were to arise where OIA would appear to have conflicting interests, OIA, in accordance with the standards, would refer the matter to the appropriate authorities, such as the Department of Justice, for investigation.

QUESTION 56. The Director testified that she, "found the Commission, as a whole, to be supportive of OIA's activities and responsive to our findings." Please give examples of, and discuss and explain instances, if any, in which OIA did not find the Commission to be supportive of OIA's activities and responsive to its findings.

ANSWER.

OIA can identify no instances where the Commission, as a whole, was not supportive of OIA activities and responsive to its findings. There have been instances in the past in which OIA has elevated audit recommendations with which the EDO disagrees to the Commission for resolution, and the Commission has disagreed with OIA. This process is entirely consistent with the procedures for resolving unresolved audit recommendations contained in OMB Circular A-50, "Audit Followup," and NRC Bulletin 1201-4.

QUESTION 57. The Director testified that, "there are never any limitations, restrictions or other impairments placed by the Commission the conduct of our assignments." However, it is a matter of record that in the case of the OIA investigation of alleged harassment and intimidation of Region IV inspectors at the Comanche Peak Steam Electric Station, OIA was directed by then-Commissioner Asselstine to make transcripts of all investigation interviews and to have the investigation conducted by a particular OIA investigator, Mr. George Mulley. Apparently these directions from Commissioner Asselstine were followed by OIA. Please reconcile that fact with the statement quoted above.

ANSWER.

OIA was under no obligation to follow Commissioner Asselstine's directions in the Comanche Peak case. At least three members of the Commission would have to approve any limitations, restrictions, or other impairments the Commission placed on OIA assignments. Commissioner Asselstine's actions with respect to the instances cited in your question were not necessarily representative of the full Commission's views.

Commissioner Asselstine's directions that a particular investigator conduct the Comanche Peak investigation and that transcripts be made of all investigative interviews were given while OIA was headed by an Acting Director. The Acting Director could have requested Commissioner Asselstine to withdraw his directions, and if Commissioner Asselstine declined to do so, the matter could have been presented to the Commission for a decision. As this was not done, it is assumed the Acting Director did not object to the selection of Mr. Mulley to conduct the investigation or to making transcripts of all interviews.

The Director, OIA, did object to two subsequent directions given her in the Comanche Peak case by Commissioner Asselstine; namely, his directions to (1) provide him with copies of transcripts of interviews while the investigation was ongoing, and (2) summarize all her conversations with senior staff regarding OIA's investigation. The Director, OIA, expressed those objections in writing to Commissioner Asselstine.

While the Director, OIA, initially had no objection to making transcripts of all investigation interviews, as the investigation progressed, it became evident that this was neither feasible nor practical. In her memorandum to Commissioner Asselstine, she pointed out the difficulties encountered when persons other than the investigator and the investigator's supervisor dictate the method for conducting interviews.

In short, the Director, OIA, did not hesitate to make her concerns known, and neither she nor Commissioner Asselstine found it necessary to bring the issues to the Commission for a decision. The Director, OIA, believes these matters were resolved to her satisfaction.

QUESTION 58. With regard to the so-called "Stello-White phone conversation" investigation,

(A) Why didn't OIA interview Steven White?

(B) Why weren't all occupants of the van interviewed, i.e. Joe Fouchard?

ANSWER.

Mr. David C. Williams of the Office of Special Investigations, General Accounting Office, is conducting a special inquiry concerning the adequacy of the OIA investigation of the conversation between Mr. White and Mr. Stello. We will provide a response to this question after we have the opportunity to review his findings.

QUESTION 62. What are the criteria that OIA has for determining whether an allegation merits an investigation. Please supply all documents which set forth OIA investigation thresholds and criteria. Please provide to the Subcommittee a copy of the April 17, 1987, document signed by the NRC General Counsel, referred to by Chairman Zech, concerning policies and procedures for OIA investigations of Commissioners and their staffs.

ANSWER.

The criteria that OIA has for determining whether an allegation merits an investigation are set forth in the the portion of the OIA Handbook entitled "Review of Allegations." It states, in part, as follows:

> When OIA receives or develops information concerning potential violations within its primary investigative jurisdiction, the information will be reviewed by the AD/I (Assistant Director for Investigations) to determine whether an investigation should be opened. The review may warrant a preliminary inquiry or investigation such as conducting interviews, or reviewing documents to determine the relevance of the basic complaints. If this review and preliminary investigation shows that employee or NRC contractor misconduct does not exist, the investigation may be closed administratively by the AD/I or higher authority.

QUESTION 62. (continued) - 2 -

Page III-14 of the OIA Handbook, which is the only document setting forth OIA investigation thresholds and criteria, is attached. Also attached is a copy of the April 17, 1987, document entitled "Policies and Procedures for OIA Investigations of Commissioners and Their Staffs."

Attachments:
May 17, 1985 OIA Handbook, page III-14 (Attachment 1)
April 17, 1987 Memo fm OGC to Commission (Attachment 2)*

*Previously supplied for the record.

H. Reorganization Plan No. 1 of 1980

This plan conferred authority on the Chairman of the Commission to initiate the appointment, subject to the approval of the Commission, of the Director, OIA, (Section 1(b)(1)(v)) and reaffirmed that the Director, OIA, reports directly to the Commission and that the Commission shall continue to receive such reports (Section 4(d)).

INVESTIGATIVE PROCEDURES

Review of Allegations

When OIA receives or develops information concerning potential violations within its primary investigative jurisdiction, the information will be reviewed by the AD/I to determine whether an investigation should be opened. The review may warrant a preliminary inquiry or investigation such as conducting interviews, or reviewing documents to determine the relevance of the basic complaints. If this review and preliminary investigation shows that employee or NRC contractor misconduct does not exist, the investigation may be closed administratively by the AD/I or higher authority. If a formal investigation is conducted, it will be processed in accordance with the procedures in this Handbook. Information or allegations received which do not fall within the primary investigative jurisdiction of OIA will be referred to the Office of Investigations (OI) or the agency having primary investigative jurisdiction, as appropriate.

Conduct of Investigation/Investigative Plan

Once it is determined that an investigation will be pursued by OIA, the AD/I will assign an investigator to the case. The investigator is responsible for planning the actions to be used in collecting evidence and for preparing all the related documentation (using the guidelines and procedures set forth in this chapter). To show the probable course of the investigation, following the Review of Allegations, the assigned investigator will prepare an Investigative Plan. The plan will be prepared within two weeks of the case assignment and will be typed on a memorandum and forwarded for approval by the AD/I

Revised May 17, 1985

QUESTION 66. The Director testified that OIA gets suggestions from the Executive Director for matters to audit.

(A) Approximately how many such suggestions does OIA get each year from the Executive Director?

ANSWER:

FY 85	FY 86	FY 87	FY 88
8	10	7	5

QUESTION 66. (Continued) - 2 -

(B) Approximately what percentage of OIA's annual audit work is done at the suggestion of the EDO?

ANSWER:

FY 85	FY 86	FY 87	FY 88
20%	25%	18%	5%

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QUESTION 66. (Continued) - 3 -

(C) About what percentage of these suggestions does OIA follow?

ANSWER:

In OIA's audit planning process, the OIA staff identifies potential audit areas at the same time audit suggestions are solicited from the Commission, the EDO and other NRC management officials. As a result, in some cases, audits are suggested by the EDO and identified by the OIA staff simultaneously. Following are the approximate percentages of EDO suggestions accepted by OIA.

FY 85	FY 86	FY 87	FY 88
37.5%	60%	43%	20%

It should be noted that in fiscal year 1986, three audits suggested by the EDO were also independently identified by OIA.

In fiscal year 1987, one audit was suggested by the EDO during the year outside the normal audit planning process, thus increasing the percentage to 57%. Also, work on two audits was already in progress when suggested by the EDO.

QUESTION 67. The Director indicated that OIA periodically briefs the Commission at its request on investigations which relate to safety issues affecting near-term operating licensees--

(A) Approximately how much of OIA's inspection work relates to safety issues involving licensees?

ANSWER:

Sixty-seven investigations and/or inquiries opened by OIA during FY 1985, 1986, and 1987 had a nexus to the public health and safety and potentially involve licensees. These represent about 25% of the cases opened by OIA in those three years. Generally, because of their complexity, cases of this type require greater investigative effort to close. For example, during the first four months of FY 1988, OIA spent about 61% of its investigative resources on cases involving safety-related issues.

About 50% of OIA's audit staff reports to the Assistant Director for Technical Audits. All of the audits performed by that group have the potential for involving safety-related issues. In Fiscal Years 1985-1987, OIA issued 22 audit reports relating to NRC's technical activities. Those 22 reports represent about 45 percent of all the audit reports issued by OIA in those three years.

Please refer to our response to Question 59 for the details regarding safety-related audits and investigations conducted by OIA.

1/27/88 BREAUX Q67

QUESTION 69. What guidelines does OIA follow in deciding which investigated matters will be referred to the Department of Justice?

ANSWER.

Generally, all OIA investigative actions which disclose potential violations of Federal laws are referred to the Department of Justice (DOJ). Violations of state and local laws are referred to the appropriate authority. The attached Pages III-54 through III-56 of the OIA Handbook set forth the guidelines OIA follows in making referrals to DOJ. The portion of the OIA Handbook entitled "Referrals to DOJ" states, in part:

> OIA is responsible for referring to DOJ, including U.S. Attorneys and the FBI, any suspected or alleged criminal violations by NRC employees or contractors. The decision to make the referral lies solely with OIA; however, before formally referring investigative matters which indicate a criminal violation to DOJ, OGC should be informed.

Attachment:

OIA Handbook, pages III-54 thru III-56

an indication that that person is a confidential source. In such cases, it may be necessary to omit names of all interviewees in order to protect the confidential source's identity.

If resources and circumstances permit, meetings with a confidential source should be attended by two investigators. This will confirm the events of the meeting. Each meeting, contact, conversation, etc., will be documented in writing.

REFERRALS TO DOJ

OIA is responsible for referring to DOJ, including U.S. Attorneys and the FBI, any suspected or alleged criminal violations by NRC employees or contractors. The decision to make the referral lies solely with OIA, however, before formally referring investigative matters which indicate a criminal violation to DOJ, OGC should be informed. In some instances, as determined by OIA, it may be desirable to consult with OGC to obtain a legal opinion prior to making a referral. Additionally, in certain cases, it may be desirable to inform the Commission prior to making a referral to DOJ. If, in accordance with the Commission's August 14, 1985, and January 15, 1985, guidance (see Attachment XXI), the Commission majority or a Commissioner disagrees with OIA's decision to refer a case to DOJ, the referral letter to DOJ will reflect this fact.

Consultation with OGC

Investigation matters which indicate a violation(s) of the proscriptions contained in 10 CFR Part 0 and which OIA intends to refer to DOJ, shall first be presented to OGC for information and consultation.

Preliminary Referrals

Preliminary referrals are usually made (1) because a declination of prosecution is likely due to the lack of evidence, the improbability of developing evidence, the relatively minor nature of the offense, or the relatively technical nature of an alleged violation; (2) there are sound reasons to believe a full scale investigation should be conducted by an office of the NRC, the FBI, or both, or another Federal agency; and (3) to obtain a legal opinion concerning whether a potential Federal violation exists. Preliminary referrals may be made either orally or in writing.

Method of Referral

Preliminary oral referrals shall be followed by a letter no later than the next business day to confirm the referral and, in the case of the DOJ, the opinions rendered. In all other instances, suspected criminality will be referred to DOJ by letter or Report of Investigation and cover referral letter. The Report of Investigation should incorporate the essential information outlined in the DOJ guidelines at Attachment XIV. It should be remembered that these guidelines are only guidelines and that the purpose of the cover referral letter is to impart information helpful to DOJ's responsibility to make a prosecutive decision and to advise other agencies of matters under their investigative jurisdiction. The letter should be as definitive as possible. In any letter referral to DOJ where interests of public health and safety or common defense of the nation may be involved, they must be indicated in the letter.

BOARD NOTIFICATION

It is NRC policy that all parties in NRC adjudicatory proceedings, including the NRC staff, have a duty to disclose to the licensing boards and other parties all new information they acquire which is considered material and relevant to any issue in controversy in the proceeding. Because OIA's investigations relate to internal NRC activities this policy generally does not apply. It is possible, however, that in the course of an OIA investigation information could be developed indicating that the actions or inactions of an NRC employee or contractor could adversely affect the health and safety of the public and constitute new information material and relevant to an adjudicatory proceeding. While OIA would not itself make board notifications, there is a question as to when NRC management should be advised of the existence of an OIA investigation and its potential conclusions.

It is OIA's policy that in cases in which issues potentially material and relevant to an ongoing adjudicatory proceeding are uncovered as part of an OIA investigation, the investigator should immediately bring the information to the attention of OIA management. The investigator should also advise OIA management as to whether the responsible NRC program office (e.g., NRR, NMSS, IE, etc.) is aware of our investigation and its potential relevance to an

QUESTION 72. With regard to OIA's "Comanche Peak" investigation, OIA Investigation 86-10:

(A) through (N)

ANSWER.

Mr. David C. Williams of the Office of Special Investigations, General Accounting Office is conducting a special inquiry concerning the adequacy of the OIA investigation of allegations of staff misconduct involving the Comanche Peak plant. We will provide responses to the subparts of this question after we have reviewed his findings.

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

CHAIRMAN

March 1, 1988

The Honorable John Breaux, Chairman
Subcommittee on Nuclear Regulation
Committee on Environment and Public Works
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I am enclosing the remaining answers to your January 27, 1988 questions pertaining to the Office of Investigations (OI), Training and Qualification of Nuclear Power Plant Personnel, the NRC Proposed Policy Statement on Maintenance, and the NRC Policy Statement on Enforcement (with the exception of 15(E) and 37) as follows: 14 through 22, 24 through 27, 29, 31, 32, 35, 41 through 46.

The other answers in these areas were provided on February 24, 1988. Remaining answers to questions concerning the NRC Office of Inspector and Auditor and the NRC Material False Statement Rule, as well as 15(E) and 37, will be sent via separate letter.

Sincerely,

Lando W. Zech Jr.
Lando W. Zech, Jr.

Enclosures: As stated

cc: Sen. Alan K. Simpson

QUESTION 14. In testimony before the subcommittee on October 8, 1987, Chairman Zech stated that there were a number of reasons, other than the lack of trained investigators, for establishing OI. Please describe other reasons or specific incidents which led to establishing OI.

ANSWER.

In the face of Congressional criticism of the NRC investigative program in late 1981 and early 1982, the Commission elected to establish an Office of Investigations that would report directly to the Commission. The Commission announced that it was taking this step to improve NRC's capability to perform credible, thorough, timely, and objective investigations. The staffing of the new office with trained investigators was an important step in achieving this goal. The Commission at that time saw a need for a centralized and high-level focus on investigations. The Commission decided to have OI report directly to the Commission.

1/27/88 BREAUX Q14

QUESTION 15. Please provide to the Committee the following, since 1982, by year:

(A) the total number of alleged violations of NRC rules and regulations referred to OI.

(B) the total number of the alleged violations which resulted in the opening of OI cases.

ANSWER.

OI has not kept records of the number of investigative requests that have been declined by OI. It is a rarity for OI to decline investigative requests, especially since the formalization of investigative request procedures has increased over the past two years. Consequently, the below cited case initiation statistics also serve as a fairly accurate indication of all matters brought to OI's attention.

YEAR	NUMBER OF CASES OPENED
1982	164
1983	186
1984	158
1985	150
1986	86
1987	87
TOTAL TO DATE:	831

1/27/88 BREAUX Q15

QUESTION 15. (continued) - 2 -

(C) the total number of cases OI referred to the Department of Justice.

ANSWER:

YEAR	CASES REFERRED DOJ
1982	0
1983	12
1984	14
1985	15
1986	15
1987	25
TOTAL TO DATE:	81

Of the 81 cases that have been referred to DOJ, 14 have been accepted by DOJ for prosecution and 25 are still pending prosecutive determination.

QUESTION 15. (continued) - 3 -

(D) the total number of cases referred to the Office of Inspector and Auditor (OIA) by OI.

ANSWER.

OI Referrals to OIA

1982 --- 0

1983 --- 0

1984 --- 0

1985 --- 2

1986 --- 7

1987 --- 3

1988 --- 1 (to be forwarded to OIA)

QUESTION 16. Since OI's inception in 1982 there has been considerable discussion of OI authority to self-initiate investigations.

(A) Specifically describe the extent of authority to self-initiate investigations.

(B) What document identifies OI's self-initiation authority?

ANSWER.

The authority of OI to self-initiate investigations is set forth in OI Policy 4. This policy, which was approved by the Commission, codifies the authority to self-initiate investigations that was granted OI at the time of its 1982 creation. A copy of the Staff Requirements Memorandum with OI policy 4 from SECY endorsing that policy is attached.

Attachment:
Staff Requirements Memo dated 3/4/83

QUESTION 16(A)&(B) ATTACHMENT

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555

OFFICE OF THE
SECRETARY

SECRETARIAT RECORD COPY

March 4, 1983

MEMORANDUM FOR: Ben B. Hayes, Director
Office of Investigations

FROM: Samuel J. Chilk, Secretary

SUBJECT: OI POLICIES

This is to inform you that the Commission has unanimously adopted the Policies elaborated in your February 25, 1983 memorandum, with the following exceptions:

A. Policy 4 as adopted by the Chairman and Commissioners Ahearne and Roberts should read, "OI investigations may be initiated at the request of the Commission, the EDO, or a Regional Administrator, or on the initiative of the Director, OI. The Director, OI, will promptly inform the Chairman of all investigations commenced by OI."

Commissioners Gilinsky and Asselstine would have preferred to have allowed individual Commissioners to initiate such investigations.

Commissioner Roberts would have preferred to have limited the Director, OI's initiation of such investigations by requiring the concurrence of the Chairman.

B. Policy 6 should be held in abeyance pending receipt of the report of the Advisory Committee on Rights of Licensee Employees Under Investigation and a Commission decision on this policy.

C. Policy 7 should be revised to read, "OI investigators may grant requests for confidentiality during the course of an investigation. NRC will respect an OI investigator's promise of confidentiality unless and until the interviewee's testimony is required for an administrative or judicial proceeding or the interviewee discloses the testimony. The identity of persons not subject to the reporting requirements of 10 CFR Part 21 who report to the Commission information addressed by that regulation will also be accorded confidentiality as required by 10 CFR 21.2."

A final version of the adopted policies is attached.

cc: Chairman Palladino
Commissioner Gilinsky
Commissioner Ahearne
Commissioner Roberts
Commissioner Asselstine
Commission Staff Offices
ASLBP
ASLAP
ACRS
PDR
EDO

Enclosure -IN BP.

Attachment not provided.

QUESTION 16. (continued) - 2 -

(C) Why was the Investigation Referral Board (IRB) established?

ANSWER:

The Investigation Referral Board (IRB) was established to assure that matters referred to OI for investigation met the dual threshold test established by the Commission of (1) a reasonable basis to believe that wrongdoing occurred, i.e., the violation at issue appears more likely to have been intentional or to have resulted from careless disregard or reckless indifference than from error or oversight, and (2) there is a regulatory need for an investigation. The first threshold is important to differentiate what cases should be handled by the staff inspection process in contrast to the investigation process. The second threshold is important because in some cases there may be sufficient evidence available to make a regulatory decision without the need for an investigation.

QUESTION 16. (continued) - 3 -

(D) Who established the IRB?

ANSWER:

The Executive Director for Operations established the IRB on October 20, 1986 with the approval of the Commission.

1/27/88 BREAUX Q16

QUESTION 16. (continued) - 4 -

(E) Did the Commission vote on establishing the IRB? If not, why not? If the Commission voted on establishing the IRB, how did each Commissioner vote?

ANSWER:

Yes, the Commissioners voted to establish the IRB. Chairman Zech proposed, with Commissioner Carr agreeing and Commissioner Roberts not objecting, to authorize the EDO to establish the IRB for a six month trial period. Commissioner Bernthal believed that this was a matter for the EDO to decide and saw no reason for Commission involvement. Commissioner Asselstine did not approve the proposal to establish the IRB.

QUESTION 16. (continued) - 5 -

(F) Explain why the OI Director was not a voting member of the IRB.

ANSWER:

The Director of OI was not a voting member of the IRB primarily because OI did not want to participate as a voting member. The staff proposed that OI be invited to the IRB meetings as an observer and participant, but not as a voting member. Commissioner Asselstine proposed to have OI as a member of the IRB. The Director of OI believed that it would be better for OI not to participate as a member of the Board to preserve OI's independence and to conserve OI's resources, but OI should receive information copies of all matters referred to the IRB. Information copies of all matters referred to the IRB were sent to OI while the IRB was in operation.

QUESTION 16. (continued)

(G) What were the findings and recommendations of the IRB?

ANSWER:

The findings and recommendations of the IRB are found in the attached May 21, 1987 report of the IRB to the Commission. Enclosure 4 of that report addresses IRB action on particular cases.

Attachment:

5/21/87 Memo from R. W. Starostecki
to Victor Stello, Jr.

QUESTION 16(G) Attachment

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

May 21, 1987

MEMORANDUM FOR: Victor Stello, Jr.
Executive Director for Operations

FROM: Richard W. Starostecki, Chairman
Investigation Referral Board

SUBJECT: INVESTIGATION REFERRAL BOARD

The Investigation Referral Board (IRB) was established as an integrated senior management review board to examine proposed requests for investigation. The purpose of the review is to assure priorities and needs for investigations are commensurate with the agency mission regarding protection of public health and safety. The IRB was composed of senior agency officials representing the three program offices [Office of Nuclear Reactor Regulation (NRR), Office of Nuclear Material Safety and Safeguards (NMSS), and Office of Inspection and Enforcement (IE)], the Director, Regional Operations and Generic Requirements Staff and the Assistant General Counsel for Enforcement, OGC. Since establishment on November 10, 1986, 24 proposed requests were forwarded to the IRB by the five Regional Administrators. In conducting reviews and prioritizing these cases the IRB used the previously issued, Commission-approved, guidelines which defined the threshold and prioritization scheme for identifying matters warranting investigation. Within two weeks of receipt, each referral was considered by the IRB in consultation with the requesting region. The resulting IRB recommendations were promptly provided in writing to the requesting region for consideration prior to a referral of a case to the Office of Investigation (OI).

As of the end of April 1987, there were four emergency referrals provided directly to OI in accordance with the IRB charter and which were not reviewed in advance by the IRB. In addition 11 of the 24 referrals submitted to the IRB were subsequently forwarded by the Regional Administrators to OI. The remaining 13 were recommended to the Regional Administrator by the IRB to be deferred (12 cases) or denied (1 case). Reasons for these deferrals and one denial were that upon careful scrutiny of the available information there was no violation of agency regulations, there was insufficient information to understand whether or not there was a technical issue affecting safety, the staff and OI were actively developing additional information to establish whether the matter warranted a referral for investigation, or there was not a reasonable basis that wrongdoing may have occurred.

During the trial period, the IRB, in consultation with the regions, reassessed the backlog of pending OI cases. As a result of this reassessment a national priority ranking of pending cases was developed. Preparation for this effort and the actual reassessment was resource intensive for senior managers in the regions and on the IRB due to the time commitments. However, the collegial process of the IRB resulted in identification of issues warranting further resolution and highlighted the need for closer coordination among regions and between the regions and the program offices. The process clarified the threshold to be used in identifying potential wrongdoing matters and provided the involved regional management a more uniform and consistent understanding of how the guidelines should be applied to future cases.

Comparison of referral statistics before inception of the IRB and during the trial period does not show significant changes in the rate of cases the regional offices identified as potential referrals for investigation. Therefore, the question is raised as to the role of the IRB and whether it should be continued or terminated. To address this question a brief discussion is warranted as to the accomplishments of the IRB and the role of such a review board in the future.

One of the principal accomplishments of the IRB was the development of a national priority for pending OI cases. During this effort, the interaction among the regions, program offices and the IRB resulted in some cases being dropped, some lowered in priority and others raised. Many of the older cases also were reassessed since documentation to allow comparison with current guidelines and standards had to be developed in order to properly assign them a priority. As a result a better understanding was developed by the regions as to overall agency needs and the impact that individual case needs, priorities and schedules have on the national ranking. Therefore, this ranking should be of assistance to OI in balancing its resources to match the needs of the agency on a national level rather than within each region. There is greater assurance that more significant issues will receive appropriate priority since it reflects the consensus views of the staff.

Another accomplishment of the IRB was the identification of specific difficulties impeding the timely and effective identification of technical matters affecting safety (i.e., regulatory need) that warranted remedial measures. In some instances there has not been a close working relationship between OI and the staff in all elements of the organization. Consequently, there is a perception that inspections and investigations are mutually exclusive and that the conduct of one will impede the other. As a result of IRB discussions with the regions, the need for closer working relationships was identified. The specific need for prompt OI assistance to the staff on certain inspections exists and guidance needs to be developed for the OI field offices. Similarly, more timely feedback from OI inquiries and investigations will enable the staff to make the appropriate regulatory decision for corrective actions. In some cases, delays on the order of 1-3 years render certain issues moot. Management involvement from both OI, the regions and the program offices is needed to resolve the perceptions that arise from a strict delineation between investigations and inspections. This has at times resulted in some friction between the staff and OI.

Historically, the staff has referred a variety of cases to OI. It is of interest that about 30% of these were treated as investigations by OI and the majority were handled as inquiries. Some of this may have been due to regional requests for inquiries rather than investigations. The issuance of the Commission-approved guidelines in January 1986 focused the staff more on the need for investigation referrals and, as a result, the need for OI assistance to the staff was not specifically addressed. Regions have relied on OI for assistance to help develop a matter, either through assistance to inspections or through an inquiry. In contrast, the IRB focused on requests for OI investigation. Comparison of the number of IRB-reviewed investigation referrals with the historical number of OI investigations shows that there is a continuing, if not increasing, need for OI investigative support. The staff has the mandate to identify and resolve technical issues affecting safety, as well as to identify potential wrongdoing matters; concurrently, OI has the mandate to pursue the wrongdoing issue. A management perspective from both a headquarters as well as a regional view, as to the regulatory need and basis for wrongdoing, is essential in resolving the competing interests for either an inspection or an investigation. In this regard I do not believe that within the staff there is a wide knowledge of or uniform understanding of the Commission-approved guidelines. Modifying the referral form to require an identification of the specific, applicable guideline being applied in each case should help. In addition, training in this area could be of assistance in establishing uniformity. Similarly, periodic reassessments of the pending OI cases will further improve the staff's understanding and application of the guidelines.

Comments solicited near the end of the trial period from the Program Office Directors, Regional Administrators, the Director, Office of Special Projects, and OGC, are generally supportive of the need for some type of an IRB. There were two commenters who suggested that the IRB either was not needed or it should have a passive oversight role.

The attached report and its enclosures more fully discuss the above matters. In summary, I believe that the IRB review process was timely and effective in identifying those issues warranting investigation as well as clearly stating a substantiated regulatory need. In my view, little delay, if any, to initiating investigations resulted from IRB review. Also, such delay appears insignificant when compared to the backlog of pending OI cases. In conclusion, the IRB performed in an advisory capacity to the Regional Administrators and Program Office Directors. In practice the IRB has probed the rationale and technical underpinning for each investigation referral request. This may have resulted in the perception that the IRB is accountable for the assigned responsibilities regarding matters referred for investigation, the reasons for the referral and the requested priority, as set forth in the EDO's directive of July 5, 1985. In determining whether or not the IRB should be continued, or the IRB charter modified, the accountability question has to be clarified. Benefits have derived from the six month trial period of the IRB; improved participation on the part of regional and headquarters managers in the referral process for OI investigations, as recommended in the IRB report, would result in a reduced need for the IRB in its present configuration.

Richard W. Starostecki

Richard W. Starostecki, Chairman
Investigation Referral Board

Enclosure:
Investigation Referral Board
Review of Six Month Trial
Period

cc w/enclosure:
J. Taylor, EDO
T. Murley, NRR
H. Thompson, NMSS
E. Jordan, AEOD
E. Beckjord, RES
J. Keppler, OSP
B. Hayes, OI
W. Russell, Region I
N. Grace, Region II
B. Davis, Region III
R. Martin, Region IV
J. Martin, Region V

INVESTIGATION REFERRAL BOARD

Review of Six Month Trial Period

The Investigation Referral Board (IRB) was established on November 10, 1986 (by a memorandum dated October 20, 1986) for a 6-month trial period. The IRB charter essentially required that two activities be performed: (1) review each referral that NRC personnel in the regions or at headquarters proposed to send to OI and (2) review on a quarterly basis the status of pending investigations. In regard to the first activity, the IRB attempted to focus discussions regarding referrals to:

(1) ensure there is a regulatory need for the investigation;

(2) determine if there is a reasonable basis for belief of potential wrongdoing;

(3) relate the referral to other referrals to OI and to agencywide priorities;

(4) ensure the suggested priority is consistent with program and overall agency needs; and

(5) review the schedule to ensure that the results would be consistent with the regulatory need.

These points are important because they constitute the test used by the IRB to ensure that the Commission's minimum guidelines were met. On January 10, 1986 the Secretary issued a staff requirements memorandum (SRM) providing a definition of wrongdoing as approved by the Commission, and establishing priorities for conducting investigations. The appendix to the SRM: (1) established the definitions to be used in determining whether there was a reasonable basis to conclude that wrongdoing may have occurred and (2) provided standards (in the form of examples) that should be used to establish a priority. Because these guidelines were in place long before the IRB was established, and the NRC staff should have understood and relied on them, it was viewed as essential that the IRB rely on them as well. During the course of the IRB deliberations it became clear that not all the staff were aware of the guidelines nor did staff members all understand them in the same way. The IRB charter and the guidelines as approved by the Commission are attached as Enclosures 1 and 2, respectively. To comply with the charter to review a referral within two weeks of its receipt, IRB met (notified in advance by written notices) the first and third Tuesdays of each month; regional personnel participated by telephone as necessary. OI personnel, both headquarters and field, were invited both orally and by memorandum to attend all IRB meetings. At a meeting between the IRB members and the Director of OI to discuss OI staff attendance and participation at IRB meetings, the IRB members unanimously stated to the Director of OI that OI staff should be encouraged to attend so that IRB could benefit from their unique insights on wrongdoing and their perspectives on activities that warranted investigation.

IRB membership during the trial period generally consisted of the Deputy Director of IE as the Chairman, SES representatives from OGC and the EDO office, a Division Director from NRR, and the Deputy Director from NMSS. Because of conflicts and subsequent reassignment within the agency, the Deputy Director of NRR proposed, and the IRB Chairman agreed to, the participation by a senior NRR Division Director.

The IRB established a system to obtain and review referrals. The requesting office or region sent a copy of each request to every IRB member and to both the OI field office and OI:HQ. The request was reviewed at the next scheduled meeting and a recommendation made at the conclusion of the discussion allowed the region that was involved to respond promptly (by telephone). The IRB served in an advisory role. In reaching its collective decision, the IRB probed the technical basis for the request, seeking to understand, for example, the safety significance of the matter. A written memorandum to the Regional Administrator recorded and confirmed the recommendation made on the telephone. Except for two referrals (one dealing with TVA and the other from the recently established NRC Office of Special Projects), all IRB referrals came from the regions; consequently, this report addresses the role of the IRB and its interaction with the regions.

Investigations that had been initiated before the IRB was established were reviewed on two occasions in order to establish a national priority listing. After the first meeting (mid-December 1986) to review the pending investigations, it became clear that in many cases priority could not be determined without additional documentation. Thus, IRB's first quarterly report dealing with pending investigations focused only on high priority cases. It also became clear that (1) the Commission's guidelines for ascertaining threshold and priority of investigations had not been uniformly applied and (2) referrals made before January 1986 did not reflect Commission guidance in all cases. As a result, the regions were asked to verify information or provide new information, consistent with the Commission's guidelines.

A meeting to review all pending cases was held in Bethesda, Md. on March 17 and 18, 1987. Each region participated by sending at least one SES manager. One Regional Administrator, three Division Directors, and one Deputy Division Director attended. Because of the wide participation and differing perspectives brought to the meeting, the meeting was productive and pending cases were assigned a national priority. How the Commission's guidance should be applied was a major topic. For example, the IRB told the regions that the phrase "safety concern for licensing" was to be viewed broadly in a regulatory oversight sense and not to be limited to the processing of licensing applications. The resulting prioritization was formally provided to the EDO, OI, Regional Administrators, and Program Office Directors on March 20, 1987 (see Enclosure 3).

To assess the activities of the IRB during the six-month trial period, several listings were developed. Enclosure 4 tabulates all nonemergency referrals submitted through April 29, 1987 for IRB review and indicates the disposition of each referral. As can be seen, 24 requests were submitted to the IRB and 11 of these were recommended for referral to OI. The remaining 13 referrals were deferred or denied because IRB found that: (1) based upon information provided by the region, there was no reasonable basis to believe that wrongdoing occurred, (2) investigations were not necessary to permit appropriate regulatory action, or (3) because OI support to the staff was in progress, a referral was not necessary. These statistics indicate that the IRB agreed with the region on about one-half of the referrals. The 1 denial and the 12 deferrals are discussed in Enclosure 7 to highlight the nature of these cases. The insights developed from these cases and from the information developed during IRB deliberations provide a basis for making a recommendation about the future of the IRB. Although the referring region or program office was free to elevate a dispute or disagree with the IRB recommendation, the option was not exercised during the 6-month trial period.

There were five emergency referrals during the IRB trial period (four came from Regional Administrators and one from a Program Office Director). After one emergency referral was submitted and the IRB Chairman had been notified, the referral was retracted. The reason for this retraction highlights one of the concerns of the IRB: the relationship between allegations and investigations and the responsibility of the region to determine whether a reasonable basis exists for viewing the allegation as valid and as a subject for referral. This specific retraction involved an unsigned note sent to the region regarding the conduct of licensed operators. Since current OI field practice is to request that the region submit an investigation referral to obtain OI assistance, the region did not readily have available OI assistance to conduct preliminary interviews. To resolve the matter promptly required the involvement of the OI Director and the Deputy EDO. An OI investigator accompanied regional staff to assess the credibility of the anonymous tip that constituted the allegation.

In order to assess whether or not the IRB process had a dramatic effect on regional referrals to OI, the staff compared the referrals from the regions before and after the IRB was established. Before the IRB existed, the regions submitted requests for either investigations or inquiries directly to OI. The specific form to be used for investigation referrals to OI was developed and promulgated by the EDO in the summer of 1985. Consequently, records for referrals to OI and the bases for them before the summer of 1985 are not necessarily complete or readily available. Using regional records, referrals were tabulated by date and by month, by region, from September 1985 to November 1986, a 14-1/2-month period that preceded the existence of the IRB (see Enclosure 5). As discussed in Enclosure 5, there are wide variations in the number and rate of referrals within and among regions. Although there is one anomaly resulting from the large number of referrals attributed to TVA cases, the rate at which the regions identified cases (either inquiries or investigations) before the IRB existed is comparable to the rate at which the regions sent cases to the IRB. Considered annually, 72 cases per year (or 57 per year excluding TVA data) were identified pre-IRB and 60 cases per year were identified since the IRB was formed. A record anomaly is discussed in Enclosure 5; taking that one into account would show that the IRB had considered about 40 cases on an annual basis. Although the comparison of 14-1/2 months of data previous to the existence of the IRB to 6 months of data since the IRB existed does not readily demonstrate a dramatic reduction in caseload, the examination of the data raises other questions: the impact of TVA issues, the issue of inquiries vs. investigations, and emergency referrals.

TVA Impact

Before the IRB was set up, 19 of 31 cases in Region II dealt with TVA. Since IRB was formed, there have been three cases regarding TVA. IRB considered one case from the region in December 1986 and deferred it for reasons discussed in Enclosure 7. There was an emergency referral from the program office director in January 1987. A third case involving TVA was referred in April 1987 by the recently constituted Office of Special Projects in coordination with the field staff; it was recommended for deferral. The IRB notes that during the 6-month trial period there were three potential referrals in regard to TVA from three distinct organizations: the Program Office submitted an emergency referral directly to OI and approved by the EDO. When TVA referrals are excluded, the Region II statistics are comparable to those of the other regions. Notwithstanding the importance of the TVA cases, the two deferrals recommended by the IRB and the attendant recommendations were adopted by the referring region/office. In one case there was no evidence of wrongdoing and the second is still being pursued.

Inquiries vs. Investigations and Timeliness

OI reports deal with either inquiries or investigations. On the basis of historical records, OI appears to use inquiries to ascertain whether or not potential wrongdoing exists and whether further followup is warranted. It has been OI practice to allow OI field offices to directly issue reports of inquiry. Investigation reports are formal, fully documented issues which require OI headquarters review and issuance.

During the 14-1/2-month period that preceded the IRB, the regions had made 87 referrals to OI. Examination of the records shows that OI initiated investigations in 25 cases, and initiated 55 inquiries, and denied 7 referrals (see Enclosure 5). These statistics indicate that OI conducted investigations in less than 30% of the cases referred to OI before the IRB was established. Concurrently, the backlog of pending cases was growing. Absent a review for priority, regulatory need or safety significance, OI has to make judgments about where to spend their resources: to pursue inquiries or to conduct investigations. For example, on March 13, 1987, one OI field office closed 15 cases. The average case was 30 months old, and the oldest case had a referral date of August 1982 (Enclosure 6). Consequently, when the concern is deferred pending the receipt of OI results, any regulatory action contemplated by the staff is affected since the passage of time may render the issue moot. In summary, based on the 14-1/2 month period that preceded the IRB, OI conducted the equivalent of about 21 investigations per year. Assuming that all cases forwarded to OI since the formation of the IRB results in OI investigations, OI should conduct the equivalent of about 31 investigations per year (refer to Enclosure 5.)

Emergency Referrals

In accordance with the IRB charter, emergency referrals could be made directly to OI by either a Regional Administrator or an Office Director, through established channels, bypassing the IRB. The IRB Chairman was promptly advised of these referrals. In this manner the IRB was kept informed as to the nature of the emergency event and the rationale for the referral. This process was used four times (three by Regional Administrators and one by a Program Office Director) during the trial period. The safety significance of the issue was used as the principal factor in making an emergency referral. Therefore, 4 of the 15 cases referred to OI were of such significance that they warranted the label "emergency referral."

Denials/Deferrals

As noted previously, the rate at which the regions identify cases is comparable to that experienced historically during the 14 1/2 months before IRB existed. However, as a result of the IRB review, 13 cases were recommended for either denial or deferral. IRB adopted the term "deferral" to identify those cases that could be resubmitted if further staff effort identified information that could be used for assessing the appropriateness of a request consistent with the Commission's guidelines. That is, IRB reviews involved discussions with the initiating regional office about the basis for the referral; at times, gaps in information were identified so that there was no reasonable basis to conclude wrongdoing occurred. If sufficient facts existed to clearly demonstrate no regulatory need, then a case could be subject to a recommended denial. In any event, any case recommended by IRB for either denial or deferral could be appealed and be resubmitted. None have been appealed. Furthermore, cases that the regions proposed for IRB review were available to OI before IRB review. Thus, OI had the flexibility to initiate a case if OI did not concur with the IRB recommendation. IRB draft procedures provided to the regions requested that written referral requests be concurrently provided to a standardized distribution which included OI.

OI Assistance

In the course of IRB deliberations, the development of factual information during an inspection was raised as an issue in those cases where there was potential wrongdoing. In numerous cases the regional staff expressed its perception that staff is expected to stop the inspection pending notification of OI. The IRB told the staff that it would be expected to develop the facts necessary to establish a reasonable basis and not to rely solely on suspicion or an anonymous allegation. Coincidentally, the OI investigation staff has an interest in preserving the facts associated with wrongdoing. There are occasions where prompt joint region/OI efforts are needed on a short-term basis (a few days) to assess whether or not a regulatory safety problem exists and whether an OI referral is needed or appropriate. The IRB told the regions that neither IRB nor OI referral was needed for the OI to assist staff in support of an inspection to develop the facts surrounding a particular case. A formal OI referral request to the IRB would delay any action needed to promptly identify an issue (e.g., interview of a licensee employee) and therefore was not viewed by the IRB as necessary. The IRB stated that it should review the case once the information is obtained to provide a reasonable basis that further investigative effort is warranted. Timely assistance from OI may be crucial in developing the facts surrounding a case; the regions should not be encumbered by the existence of the IRB to obtain support from OI in such circumstances. Assistance from OI field offices should be coordinated between the regional staff and the OI staff. On the basis of feedback from regional managers, OI field offices need guidance as to how such requests should be handled so as not to delay the process and concurrently to effectively manage OI resource commitments. In January 1987, the OI Director and the IRB Chairman agreed about the desirability of such an approach; however, the IRB is not aware of any guidance to OI field offices supporting this approach nor did OI offer an alternative response to a written proposal regarding OI assistance sent by the IRB in February 1987. The staff's role is to identify and ensure appropriate resolution of technical safety issues; once a safety problem is known to exist the staff cannot condone its continued existence. Enforcement, management meetings, or written reports are used to identify issues for the purpose of seeking corrective action. The need for OI information is not less significant in those instances of potential wrongdoing. There is a need to recognize those cases in which close cooperation is needed to satisfy both needs. Historically, prior to the promulgation of the Commission's minimum guidelines for investigation in January 1986, the regions occasionally used the referral process to request OI inquiries as a convenient form for soliciting OI assistance. As discussed previously, this factor has affected the statistics of referrals for OI investigations since the referrals included requests for assistance and or inquiry.

Recommendations

After five months of experience, the IRB had prepared proposed recommendations (see Enclosure 8) and solicited comment from all of the Regional Administrators, Program Office Directors, OGC, and the Director of Special Projects. These comments and overview of them for the purpose of identifying a common theme(s), if any, are enclosed (Enclosure 9). In general, the comments from the Regional Administrators are favorable and supportive about the results achieved by the IRB. However, the Director, Office of Special Projects, does not beleve that IRB should continue. Similarly, the Administrator, Region II does not believe that each request should be reviewed by the IRB in advance of referral to OI. The proposed recommendations were modified and, based on its experiences, the IRB makes the following recommendations:

(1) OI and the NRC staff should be encouraged to coordinate their activities at all levels. It is the view of the IRB that the activities of the IRB would have been expedited and enhanced by the participation of OI staff. Closer working relationships should be fostered so that the agency's objectives are attained with a clear understanding by OI and the staff of their respective roles. Matters identified as potential wrongdoing need to be followed or pursued far enough by the staff to adequately address technical safety concerns. The distinction between "wrongdoing" and "technical safety concerns" will not always be clearly identified, nor in some cases can it be. Consequently, the respective staffs must work together until the regulatory and wrongdoing issues are clearly established.

(2) NRC staff inspections can sometimes benefit from the participation by OI staff. Such assistance from OI is generally needed on short notice and is not conducive to review by a board. There is a need to clearly distinguish between requests for OI investigations and requests for OI assistance. OI assistance refers to those situations where there is a need for OI support (e.g., conduct of an interview) in an inspection to collect additional data or information so that a reasonable determination can be made as to whether wrongdoing may be involved and whether there is a regulatory need for an OI investigation. OI assistance appears to be the type of OI effort that may not be resource-intensive and for which OI may be able to provide prompt, valuable support to the staff. OI guidance to its field offices on this issue is needed to ensure a consistent response to regional requests for assistance. Similarly, guidance is needed for the regions as to how and when to request OI assistance.

(3) To foster closer coordination between OI and staff, OI staff should be encouraged to attend pertinent regional enforcement conferences, allegation panel meetings, and management meetings. In those cases where OI initiates its own inquiries or investigations, it should coordinate with the Regional Administrator or the Program Office on the status of the staff's deliberative process. The clear definition of the regulatory need evolves from the deliberative process; to ensure that the appropriate regulatory need will be satisfied by the OI effort, close coordination between OI and the staff during initiation of, as well as during the conduct of, the investigation should be encouraged.

(4) OI and regional staff should be encouraged to provide feedback to each other more routinely. The development of additional technical information resulting from certain OI investigative efforts can be important in deciding on the appropriate regulatory action. Consequently, when a technically knowledgeable individual works on selected OI efforts, the results can be more useful. Such presence would contribute to a more meaningful feedback upon which changes could be considered in the priority, need for, and direction of the investigation. Conversely, OI presence on certain staff inspections could provide additional perspective to the staff. To ensure feedback is attained, OI field offices and regional managers should hold periodic briefings on status of activities in progress. These briefings could also assist in the regional prioritization of cases.

(5) Efforts should continue to ensure that the Commission's guidelines of January 10, 1986 for requesting and prioritizing investigation requests are consistently interpreted. In this regard, the form used by the staff to request an investigation should be modified in certain respects. First, the form should be revised to require a short statement of the safety significance of the issue. To enhance more consistent and uniform application of the guideline(s), the form should also include in the prioritization request a reference to the applicable subparagraph of the guidelines which best matches the rationale for the priority.

(6) The IRB process has fostered improved communication and coordination among the regions and between the regions and headquarters. Participation of representatives from the Office of General Counsel (OGC) and the Staff Director for Regional Operations and Generic Requirements (DEDROGR) has been valuable in providing constructive suggestions and recommendations; the synergism resulting from the IRB discussions has been most beneficial and the consensus decisions of the IRB have resulted in no cases being contested by any requesting region or office. Although at times, the IRB process was resource intensive because of the time commitments on the IRB members (routine meetings usually required 2-3 hours), the level of involvement was desirable in light of the variety of issues. It is recommended that the level of management and composition of the IRB be reevaluated. In light of the recent reorganization, representation from the Office for Analysis and Evaluation of Operational Data (AEOD) is recommended since that Office has increased involvement in operational events at both reactor facilities and non-reactor licensees. Participation by the newly created Office of Enforcement under the Deputy Executive Director for Regional Operations (DEDRO) is recommended because the enforcement function has been transferred from IE to DEDRO. Accordingly, a reconstituted board made up of four SES-level senior managers could continue to provide the function of the IRB.

(7) On the basis of the considerations listed above and the comments provided by the Regional Administrators, the IRB in its present configuration and its review process should be retained, unless Regional and Headquarters SES-level managers become more involved in the referral process. If the IRB is retained, the membership of the IRB should be modified, in light of the reorganization, to include representation from NMSS, NRR, AEOD, and DEDRO. Attendance by OGC and OI should be encouraged; their views on wrongdoing need to be more fully considered by the regional and headquarters staffs.

(8) Retain the concept of a national priority listing that is periodically updated. At least every six months, all pending OI cases should be reevaluated for their regulatory need and priority. The program offices (NRR and NMSS) with participation of senior managers from each region in conjunction with the Deputy EDO for Regional Operations should reassess all cases so as to provide a prioritized tabulation to OI. Based on the initial ranking developed to date, OI should give consideration to address on a priority basis the large number of pending cases in Region III as well as to provide dedicated resources for the relatively large number of TVA cases.

(9) The concept of an emergency OI referral should be retained. Guidance needs to be developed for the Regional Administrators as to the threshold of such requests and the need for coordination with the respective Program Office. Emergency referrals are infrequent (four in six months) and do not appear to impose a burden on the staff. Their treatment reflects the urgency of the matter and its immediate potential impact on public health and safety. Emergency referrals from the region should be coordinated with the appropriate program office and the Deputy EDO for Regional Operations.

Advising the IRB Chairman, in accordance with the charter, of the emergency referral describing the event and rationale for the referral has worked well. A copy of the final written request should routinely be forwarded to the IRB for information.

Enclosures:
1. EDO Memorandum dated October 20, 1986: System for Coordinating, Reviewing, and Approving Requests for Investigation
2. Staff Requirements Memorandum (SRM) dated January 10, 1986 -- SECY-85-369, "Threshold and Priorities for Conducting Investigations"
3. Memorandum from IRB to the EDO dated March 20, 1987 re: National Priority Listing of Pending OI Cases
4. IRB New Referral Disposition Table
5. Review of OI Referrals Over Time with Attachments:
    - A. Regional Referrals Provided to OI by Region (9/85-11/10/86)
    - B. Regional Referrals Provided to OI by Region (11/10/86-4/9/87)
    - C. Disposition of Regional Referrals Provided to OI by Region (9/85-11/10/86)
6. Tabulation of Selected Cases Closed Administratively by OI
7. Summary of 13 Cases Not Recommended for Investigation Referral by IRB
8. Proposed IRB Recommendations dated April 10, 1987
9. Comments Provided on Proposed IRB Recommendations

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

OCT 2 0 1986

MEMORANDUM FOR: Those on Attached List

FROM: Victor Stello Jr.
Executive Director for Operations

SUBJECT: SYSTEM FOR COORDINATING, REVIEWING AND APPROVING REQUESTS FOR INVESTIGATIONS

The Commission has concurred in my plan to establish the Investigation Referral Board. My main reason for recommending the establishment of the Board is that I do not believe the present system for referring matters to OI for investigation assures, from an agencywide perspective, that the priorities and schedules assigned to investigations meet both individual program needs and agencywide regulatory needs. The new Investigation Referral Board will review all staff-requested investigations, provide a central focus for all referrals to OI, and assign priorities and schedules commensurate with agencywide needs. The Charter for the Investigation Referral Board is enclosed.

The Board will be chaired by the Deputy Director, IE, and will include the Deputy Office Directors of NRR and NMSS, the Director of the Regional Operations and Generic Requirements Staff, and the Assistant General Counsel for Enforcement. I expect IE to provide staff support to the Chairman of the Investigation Referral Board. The Board will be established for a 6-month trial period to determine if the new review process provides, in a timely and efficient manner, the desired assurance that the priorities and schedules for referrals to OI are commensurate with agencywide needs. Near the end of the 6-month period (April 1987), I will decide, based on the recommendations of the Board, OI, and headquarters and regional offices, on any further modifications to the Board or the referral process. The Board Chairman shall provide me with a composite report regarding this matter.

The elevation of the referral process to an integrated senior management review board is an indication of the importance of investigations in meeting the regulatory mission and of the need to assure that agency priorities for investigations are met. The establishment of the Board does not relieve the Regional Administrator or Office Director of the responsibility to prepare quality requests for investigation or to assure referrals are prepared in conformance with the threshold and priorities established by the Commission.

The Charter has a provision to allow the Regional Administrator to make referrals directly to the Director of the OI Field Office or the Office Director to make referrals directly to the Director OI through the EDO in certain situations which require prompt OI action. The Regional Administrator or Office Director should promptly advise the Board of such referral and describe the reason for direct referral.

As indicated in the Charter, OI will be invited to attend Board meetings, and I expect this process will result in improved coordination and interface with OI. The Charter maintains the existing lines of communication to OI for referrals. Board decisions and recommendations for referrals to OI from the regions will be returned to the Regional Administrator for transmittal to the Director of the OI Field Office, while headquarters referrals will be returned to the headquarters office for transmittal to the Director, OI through the EDO. If the requesting office disagrees with the Board's recommendation, the requesting office should discuss the referral with the Board Chairman and, if appropriate, resubmit the referral with accompanying new supporting information for reconsideration by the Board. If no new supporting information is available or the Board's recommendation from the second review is unacceptable to the requesting office, the matter should be brought to the attention of DEDROGR for resolution.

The new Investigation Referral Board should not affect the staff interactions, especially in the regions, with OI staff. I expect that regional staff and OI field staff will continue to meet frequently to review the status of ongoing and planned investigations and that in many cases the staff and OI will have preliminary discussions to review new allegations and issues of potential wrongdoing.

In implementing the new referral program, regional offices and headquarters offices should continue to use the guidelines provided in the Staff Requirements Memorandum of January 10, 1986, SECY 85-369, "Threshold and Priorities for Conducting Investigations," in recommending matters for referral to OI, in reviewing the regulatory need for the investigation, and in assigning requested priorities to each proposed referral. However, copies of all regional and headquarters requests for investigation should now be forwarded from the requesting Office Director/Regional Administrator to the Chairman of the Investigation Referral Board and Board members. Copies of each request should also be forwarded by the regions to the OI Field Office and by headquarters to the Director, OI. The office or region making the request is responsible for assuring that there is sufficient information in the request to permit the Board to reach a determination as to whether there is a reasonable basis to believe the matter involves wrongdoing and to whether there is a regulatory need for the investigation. However, sensitive information (such as confidential allegers identity) should be expunged from the information provided to the Board to the extent appropriate. The Board may request additional information as may be needed to support the review of requests.

The Investigation Referral Board and the reviewed process for making staff referrals to OI will be effective November 10, 1986. MC-0517 need not be revised until completion of the trial program.

Victor Stello, Jr.
Executive Director
for Operations

Enclosure:
Charter of the
Investigation Referral Board

cc: J. H. Sniezek
B. Hayes, OI
S. Connelly
T. Rehm, EDO
R. Brady, NRR

CHARTER FOR THE INVESTIGATION REFERRAL BOARD

I. Purpose

A. To review each regional or headquarters proposed referral to OI for investigation to:

1. Assure there is a regulatory need for the investigation,
2. Determine if there is a reasonable basis for belief of potential wrongdoing,
3. Review the referral in relation to other referrals to OI and in relation to agencywide priorities,
4. Review the assigned priority (high, normal, low), and assure the priority is consistent with program and overall agency needs, and
5. Review the schedule when the results of the investigation are needed to support regulatory action.

B. To review periodically the status of all outstanding referrals to OI for investigation, to reestablish the priorities or continued need for the outstanding referrals (in consultation with the Regional Administrators), and to provide the reprioritization to OI. Generally, this review should be performed quarterly.

II. Membership

Deputy Office Director, IE (Board Chairman)
Deputy Office Director, NMSS
Deputy Office Director, NRR
Director, Regional Operations and Generic Requirements Staff
Assistant General Counsel for Enforcement, OGC

If Board members are unable to attend a Board meeting, they should appoint an alternate to substitute for them. Alternates should normally be Division Directors or above. If the Board Chairman is unable to attend a Board meeting, the Chairman shall designate a Board member to be acting Chairman for the meeting.

III. Meetings

The Board Chairman will be responsible for scheduling and conducting the meetings. Meetings should be be scheduled as the Board Chairman deems appropriate considering the safety significance of the matters to be referred. Generally, all referrals should be reviewed within 2 weeks of receipt by the Board. It is expected that the Board include regional management, via conference call, in the discussion and review of some of the investigation referrals.

For purposes of conducting a meeting, a minimum of three Board members is necessary to constitute a quorum. Decisions of the Board will be made by a majority vote of the Board members present at the meeting.

OI should be invited to attend the meetings as an observer and participant, but OI will not be a voting member of the Board.

IV. Feedback to Requesting Office and Referrals to OI

The Board Chairman will be responsible for informing the requesting office of the Board's decision on each referral for investigation and for returning the referral for investigation to the originating office with the Board's recommendation regarding referral to OI. Each office will then be responsible for forwarding those referrals approved by the Board to OI through the established channels (through the EDO to the Director, OI for headquarters offices and to the Director of the OI Field Office from the Regional Administrator for regional offices).

In an emergency, the Regional Administrator or Office Director may make referrals directly to OI through the established channels. The Regional Administrator or Office Director should promptly advise the Board Chairman of the referral and describe the emergency event and rationale for the referral.

In instances where the requesting office and the Board disagree on the recommendation for referral to OI and either the requesting office has no new information to support reconsideration by the Board or the Board has reconsidered the referral and there is still disagreement on referral to OI, the Board Chairman should bring the matter to the DEDROGR for resolution.

V. Status Reports

A quarterly status report will be provided to the EDO. The report will summarize the reviews completed during the quarter (including the reprioritization of outstanding referrals); summarize the status of all outstanding referrals to OI; identify completed OI investigations; and identify those referrals not accepted by OI and returned to the staff for action. The report should also identify any problems or potential problem areas. Any problems or issues which cannot be resolved by the Board should be brought to the attention of the EDO.

The Board Chairman will be responsible for preparation and dispatch of the status report. Copies of the report to the EDO should be provided to the DEDROGR, Directors of NRR, NMSS, IE, OGC, OI, the five Regional Administrators, and the Board members.

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555

OFFICE OF THE
SECRETARY

January 10, 1986

Roe
Rehm
Sniezek
Taylor
Davis
Denton
Lieberman

OI K

MEMORANDUM FOR: Victor Stello, Jr., Acting Executive Director for Operations

Ben B. Hayes, Director
Office of Investigations

FROM: Samuel J. Chilk, Secretary

SUBJECT: STAFF REQUIREMENTS -- SECY-85-369, "THRESHOLD AND PRIORITIES FOR CONDUCTING INVESTIGATIONS"

The Commission, by a vote of 4-1, approved the appendix ("Guidance for Initiation, Establishment of Priorities and Termination of Investigation") to SECY-85-369, pending the modifications enclosed.

The Commission expects the guidelines will be incorporated into the appropriate NRC Manual Chapters or Procedural Manuals.

The Commission expects OI and the staff to use these guidelines to deal with the pending large inventory of investigation requests which have been around for some years without any work being initiated. In addition, if there is OI disagreement on setting priorities based on these guidelines, the Commission should be promptly informed.

Commissioner Asselstine approved the guidelines as proposed with two modifications. He does not approve the guidelines as modified by the Commission.

Enclosure:
As Stated

Copies:
Chairman Palladino
Commissioner Roberts
Commissioner Asselstine
Commissioner Bernthal
Commissioner Zech
Commission Staff Offices
Regional Offices
ASLBP
ASLAP

Rec'd Off. EDO
Date......1-10-86
Time......1:45P

APPENDIX

GUIDANCE FOR INITIATION, ESTABLISHMENT OF PRIORITIES AND TERMINATION OF INVESTIGATIONS

Thresholds for Investigations

All instances where: 1) there is a reasonable basis for belief of wrongdoing; */ and 2) the staff determines an investigation is necessary for it to decide whether enforcement or other regulatory action is required should be referred to the Office of Investigations (OI). Matters not involving wrongdoing should normally neither be referred to nor accepted by OI for investigation. Upon receipt of a completed request form (see the EDO's July 5, 1985 Memorandum) OI will initiate an investigation if:

1) The staff has found that the alleged wrongdoing has had or could have an impact on the public health and safety, the common defense and security, protection of the environment, or antitrust laws provided that these matters are within NRC jurisdiction; and

2) The Director, OI determines that there is a reasonable basis to believe that the matter involves wrongdoing; and

3) The Director, OI determines that there is sufficient information available to support the allegation to warrant initiation of an investigation.

In accordance with current Commission guidance, OI would seek Commission approval prior to initiating an investigation relating to the character/integrity of an individual within OI jurisdiction.

OI will notify the requester within 30 days as to whether the matter has been accepted for investigation and, if so, the priority of the investigation and the estimated schedule. If on review of the request, there is a reasonable

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*/ Wrongdoing consists of both intentional violations of regulatory requirement and violations resulting from careless disregard of or reckless indifference to regulatory requirements amounting to intent. A reasonable basis for beli of wrongdoing exists when, from the circumstances surrounding it, a violatio of a regulatory requirement appears more likely to have been intentional or to have resulted from careless disregard or reckless indifference than from error or oversight.

belief that the alleged wrongdoing is solely a product of careless disregard or reckless indifference, OI will not normally conduct an investigation unless the requester indicates that the matter requires application of OI resources because there are major regulatory implications and the Director, OI concurs with this judgment. OI will notify the requester if there is a substantial change in the estimated schedule for completion of an investigation. If a request is not accepted, OI will provide the requester with the basis for its decision. Any differences between the staff and OI on the need for or priority of an investigation shall be resolved in accordance with the process described in the EDO's July 5, 1985 Memorandum.

Priorities for Investigations

The staff will recommend a high, normal or low priority for each case referred to OI. Each case accepted for investigation by OI will be assigned a priority of high, normal or low by OI. The following examples should be used as guidance in establishing the priority of a case for investigation.

High

A. Current manager, licensed operator or other employee involved in deliberate violation of requirements having high safety significance, e.g., continuing potential for unnecessary radiation exposure to employees or members of the public.

B. Suspected tampering with vital equipment at a power reactor.

C. Allegations of falsification of records available for NRC inspection or submittals to the NRC or deliberate withholding of information required to be reported to the NRC, where the situation involved presents an immediate and continuing health and safety concern, e.g.,

   1. falsification of records having high safety significance, such as falsifications which conceal a repeated failure to perform a required test;

   2. alleged withholding of significant design flaw or seismic criteria information for an operating facility; or

   3. level of individual involved in the alleged withholding of information or falsification is such that a serious question of the willingness of management to conduct safe operations is raised.

D. Allegation of falsification of records available for NRC inspection or deliberate violations of NRC requirements concerning an area of significant safety concern for licensing.

E. Allegations of wrongdoing where immediate investigation is necessary to ensure preservation and availability of evidence or which are in some other way time perishable.

Normal

A. Allegations of intimidation or harassment of QC inspectors or workers on safety-related equipment at a facility under construction.

B. Allegations of deliberate violations of NRC requirements where there is no indication the violation is recurring or causing immediate and direct health and safety impact on the general public or employees.

C. Allegations of falsification of records available for NRC inspection or deliberate violation of NRC requirements of safety concern in the licensing process.

Low

A. Allegations of deliberate violations of NRC requirements, falsification of records or submittals to NRC, or harassment or intimidation of workers where the licensee is aware of the allegation and has already undertaken corrective action. An NRC investigation is needed to determine the degree of culpability only if there is evidence of a deliberate violation of NRC requirements.

B. Allegations of deliberate violation of NRC requirements at an operating facility where there is no near-term safety concern, e.g., the reactor is in long-term shutdown.

Termination of Investigations

For low and normal priority cases, OI may close a case if its projection of resource allocations indicates that the investigation could not be initiated within a reasonable period of time which will generally be six months. OI may close a case following its initial evaluation if at that time OI is able to make a projection of its resource allocations and the case would not be initiated within a reasonable period of time, e.g., six months. The decision to terminate an investigation which has been initiated will normally be made outside the context of the investigative priority/threshold system. OI will normally continue an investigation only if there is a reasonable basis for a belief that the matter being investigated involves a deliberate violation of NRC requirements. The decision to terminate an investigation will be a case-by-case assessment by the Director, OI of such issues as whether the relevant facts necessary to resolve the matter under investigation have been gathered, whether allegations of events or conditions are so old that witnesses are unavailable or could no longer be expected to recall pertinent information, or whether continued investigation would be nonproductive or otherwise not serve the agency's interests. If the requester of an investigation determines that the need for or priority of an investigation has changed, that information will be provided to the Director, OI for his consideration.

Attachment: Memorandum from W. J. Dircks to
Office Directors and Regional Administrators,
dated July 5, 1985, PROCEDURE FOR REQUESTING
OI INVESTIGATIONS

ENCLOSURE 3

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

MAR 20 1987

MEMORANDUM FOR: Victor Stello, Jr.
Executive Director for Operations

FROM: Richard W. Starostecki, Chairman
Investigation Referral Board

SUBJECT: INVESTIGATION REFERRAL BOARD

On March 17 and 18, 1987, the IRB met with Regional managers to discuss the backlog of OI referrals and other issues. On the basis of the IRB experience to date and these recent discussions, we are preparing a recommendation on how to proceed. Comments will be solicited from the program offices and regions as part of this effort.

The purpose of this memo is to provide the results of the joint IRB-Regional effort on the establishment of priorities from a national perspective. All OI referrals have been reevaluated in light of the Commission's January 10, 1986 guidelines. Some cases have been reprioritized. Enclosure 1 provides a tabulation of existing cases, excluding those associated with TVA, by priority (high, normal, low). Within the high priority category the listing is subdivided into 3 areas: upper, medium, and lower. The purpose of this subdivision is to highlight relative priorities, since we did not feel that a strict numerical ranking could be achieved in the time available and this approach covers the similar emphasis. The high-upper category includes 4 cases, the high-medium category includes 15 cases, and the high-lower category includes 6 cases. A comparable effort with the normal priority cases resulted in a subdivision into 2 areas: upper and lower. Ten cases were considered to be normal-upper and 11 cases were to be considered normal-lower. Again, a strict numerical ranking was not possible. Based on the volume of the backlog, OI progress to date in completing cases, and the staff need for OI to address the higher priority cases, a numerical ranking or further breakdown of low priority cases was not deemed to be constructive.

Enclosure 2 tabulates all the existing OI referrals dealing with TVA. Due to the unique problems associated with TVA and recognizing the formation of a dedicated task force within the staff, we did not believe that it was appropriate or possible to integrate the TVA cases. In this regard, it may appear more appropriate for OI to consider adopting an approach for TVA similar to that of the staff: the dedication of selected OI staff to address TVA cases.

MAR 20 1987

By copy of this memo I am providing this listing to OI and the Regions.

/s/

Richard W. Starostecki, Chairman
Investigation Referral Board

Enclosures: As stated

cc: B. Hayes, OI
Regional Administrators
J. Taylor, IE
H. Denton, NRR
J. Sniezek, NRR
J. Zerbe, IRB Member
F. Miraglia, IRB Member
V. Miller, IRB Member
J. Lieberman, IRB Member
R. Burnett, IRB Member

OUTSTANDING (EFERRALS
(EXCLUDING TVA)

HIGH PRIORITY CASES

1. Cases of Utmost Importance

FACILITY	OI CASE NUMBER	REGIONAL OR PROGRAM OFFICE REFERRAL NUMBER
WPAFB	3-86-12	III-86-10
Dresden	3-87-02	III-87-01
Advanced Medical	3-86-10	III-86-09
US Testing	5-87-01	V-87-01

2. Cases of Higher Importance

FACILITY	OI CASE NUMBER	REGIONAL OR PROGRAM OFFICE REFERRAL NUMBER
St. Barnabas	1-86-14	I-86-07
NFS	2-86-01	II-85-09
Greenbrier	2-85-16	II-85-01
Hines	3-87-03	III-87-02
Clinton	3-83-18	pre-form
"	3-84-01	pre-form
"	3-84-10	pre-form
"	3-84-12	pre-form
"	3-85-04	pre-form
"	3-85-09	pre-form
"	3-86-08	pre-form
Braidwood	3-83-33	pre-form
A-1 Investigation	4-86-10	IV-86-06
Rancho Seco	5-86-10	V-86-10
Diablo Canyon	5-87-02	V-87-02

3. Cases of Lower Importance

FACILITY	OI CASE NUMBER	REGIONAL OR PROGRAM OFFICE REFERRAL NUMBER
Shoreham	1-86-03	I-86-03
Fermi	3-85-19	III-85-192
Fermi	3-86-02	III-86-02
Palo Verde	5-86-03	V-86-03
Power Inspection	1-86-40	IE-86-01
NFS	2-87-01	II-86-27

NO: PRIORITY CASES

1. Cases of Higher Importance

FACILITY	OI CASE NUMBER	REGIONAL OR PROGRAM OFFICE REFERRAL NUMBER
Metro Health	1-86-15	I-86-09
Pesses	1-85-25	I-85-08
Farley	2-86-05	II-85-03
Kelsey-Hayes	3-86-09	III-86-06
Radition Sterlizers	3-86-09	III-86-03
Ogle Petroleum	4-65-40	IV-85-13
South Texas	4-86-06	IV-86-06
Eagle	4-86-16	IV-86-08
WNP	5-86-04	V-86-04
Telemecanique	1-86-50	IE-86-02

2. Cases of Lower Importance

FACILITY	OI CASE NUMBER	REGIONAL OR PROGRAM OFFICE REFERRAL NUMBER
Susquehama	1-86-02	I-86-01
Surry	2-85-32	II-85-07
Brunswick	2-86-27	II-86-21
LaSalle	recent case referral	III-87-03
Braidwood	3-85-18	III-85-142
Perry	3-83-23	pre-form
Davis-Besse	3-83-08	pre-form
Davis-Besse	3-85-16	III-85-140
Ft. Calhoun	4-86-01	IV-86-01
Palo Verde	5-86-05	V-85-05
Rancho Seco	5-86-12	V-86-09

2 PRIORITY CASES

FACILITY	OI CASE NUMBER	REGIONAL OR PROGRAM OFFICE REFERRAL NUMBER
NFS	2-85-07	pre-form
GE	2-84-09	II-84-01
Braidwood	3-84-23	pre-form
Fermi	3-86-06	III-86-04
Perry	3-85-10	pre-form
Perry	3-85-17	III-85-171
Comanche Peak	4-86-13	IV-86-05
H & G	4-86-15	IV-86-09
River Bend	4-86-17	IV-86-11
U of WY	recent case referral	IV-87-01
Rocky Mountain	recent case referral	IV-87-10
Rancho Seco	5-86-11	V-86-12
San Onofre	5-83-21	pre-form
San Onofre	5-85-44	pre-form
San Onofre	5-85-50	pre-form
Trojan	5-86-13	V-86-11
Palo Verde	5-86-09	V-86-08
Westinghouse	1-86-70	IE-86-01
NUTHERM	3-86-03	IE-86-04
Exosensors	5-86-08	IE-86-07

OUTSTANDI[illegible]I CASES
(TVA ONLY)

HIGH PRIORITY CASES

OI CASE NUMBER	REGIONAL OR PROGRAM OFFICE REFERRAL NUMBER
2-87-02	NRR-87-01
2-85-31	SMT/self-initiated
2-86-16	NRR-86-02
2-86-15	NRR-86-01
2-86-02	11-86-05
2-86-25	SMT/self-initiated
2-86-13	11-86-08

NORMAL PRIORITY CASES

OI CASE NUMBER	REGIONAL OR PROGRAM OFFICE REFERRAL NUMBE
2-86-20	11-86-09 & 11-86-17
2-86-07	11-86-01
2-86-08	11-86-01
2-86-09	11-86-04
2-85-27	SMT/self-initiated
2-85-29	SMT/self-initiated
2-85-185	SMT/self-initiated

LOWER PRIORITY CASES

OI CASE NUMBER	REGIONAL OR PROGRAM OFFICE REFERRAL NUMBER
2-86-11	11-86-02
2-87-05	11-86-25
2-86-12	11-86-05
2-86-23	11-86-23
2-86-26	11-86-24
2-86-21	11-86-19

ENCLOSURE 4

INVESTIGATION REFERRAL BOARD

NEW REFERRAL DISPOSITION

IRB RECOMMENDED DISPOSITION / MONTH	APPROVED	DENIED	DEFERRED
NOVEMBER 1986	86-001 (R3-86-10)		
DECEMBER 1986	86-004 (R2-86-27) 86-005 (R3-86-11)	86-006 (R5-86-19)[1]	86-002 (R2-86-26)[2] 86-003 (R5-86-16)[3]
JANUARY 1987			87-001 (R2-87-01)[4]
FEBRUARY 1987	87-002 (R3-87-02) 87-003 (R4-87-01)		
MARCH 1987	87-012 (R5-87-02) 87-013 (R4-87-10) 87-014 (R3-87-03)		87-004 (R4-87-02)[5] 87-005 (R4-87-03) 87-006 (R4-87-04) 87-007 (R4-87-05) 87-008 (R4-87-06) 87-009 (R4-87-07) 87-010 (R4-87-08) 87-011 (R4-87-09)
APRIL 1987	87-015 (R1-87-01) 87-016 (R2-87-02) 87-017 (R2-87-03)		87-018 (OSP-87-01)[6]

[1] No regulatory requirement; supplemental information developed in response to IRB indicated no violation had occurred; no investigation needed.

[2] Request for assistance; OI support had already been initiated.

[3] Supplemental information to be obtained by region to assess licensee corrective actions and effectiveness of program to eliminate "chilling" effect of contacting NRC.

[4] Supplemental information to be obtained by region to assess regulatory need and status of assertion made in Congressional testimony.

[5] Issue deals with materials licensees that cannot be readily located; advice of program office to be sought to determine appropriate action and level of effort to be expended to locate missing licensees (87-004 through 87-011)

[6] Allegation dealing with contractor performance, to be submitted to TVA Inspector General (IG); upon completion of IG activities, staff to reconsider appropriateness of referral to OI.

ENCLOSURE 5

Review of OI Referrals Over Time

Prior to the IRB, the Regions submitted referrals to OI directly to their respective OI field office. In July 1985 the EDO promulgated guidance to the Regions which mandated the use of a form for submitting referrals to OI. The form was used to forward both requests for inquiries as well as for investigations. A clear basis for OI referrals prior to September 1985 is not consistent or available among Regions and requests are not complete or readily available. A tabulation of all OI referrals from each Region, by month, from September, 1985 to the IRB inception is attached. As can be seen in the listing, the rate of referrals by each Region varies. Similarly, the variation from Region to Region are of interest. Based on the 14 1/2 month period preceding the IRB, the cases referred to OI are as follows:

Region	I	II	II (Excluding TVA)	III	IV	V
Referrals	14	31	12	10	15	17

On an annualized basis these referrals are equivalent to 72 cases. However, since the number of Region II cases was about double that of the other Regions, further review identified that 19 of the cases were attributable to TVA. Neglecting the TVA cases from Region II, the rate of case referrals is equivalent to 57 cases on an annual basis. In summary, the rate of referrals during the 14 1/2 months preceding the IRB is on the order of 57 to 72.

In examining the data in Enclosure 4, there is one anomaly that warrants attention. One Region submitted eight separate referrals since eight separate dockets were involved. Prior to the IRB OI had rejected the referral from the Region and recommended resubmittal as eight separate cases. For comparison purposes, extrapolating the data from the IRB trial period is influenced by this anomaly. A strict numerical extrapolation of the data in Enclosure 4 results in an annual rate of 60 cases being referred to the IRB. Accounting for the anomaly lowers this rate on an annual basis to 40 cases. In summary, the rate of potential issues identified by the Regions during the IRB trial period is on the order of 40 to 60.

Comparing referrals before and during the IRB shows that the IRB rate is lower compared to historical records. However, the wide historical variations do not allow a simple comparison that portrays a complete picture. Specifically, the statistics can be used to show a variety of conclusions. For example, the first five months (9/85-1/86) of available records after initiation of the formal OI referral process instituted in the summer of 1985 indicates 22 cases identified by the Regions. For the first five months of the IRB

(11/10/86-4/9/86) the Regions identified 25 cases (two of which were emergency referrals). These time intervals reflect the imposition of new requirements for the Regions and are provided solely to ascertain whether there is a dramatic difference attributable to either the EDO directive in July 1985 or to the IRB process.

The statistics presented in Enclosure 4 show the number of cases brought to the IRB and show the recommended disposition. When adding the 11 cases referred to the IRB and the three emergency referrals from the Regions, there were 14 referrals forwarded to OI either directly or following IRB review. On an annualized basis this is equivalent to 30 cases. Comparing this value with the rate(s) previously discussed as being representative of potential issue identification during the IRB (40 to 60), one can conclude that IRB nominally reduced the caseload going to OI by 25% to 50%.

A comparison of these statistics with those cases preceding the IRB must be viewed in perspective. Specifically, the rate of referrals to OI for the 14 1/2 months prior to the IRB was on the order of 57 to 72.

The disposition by OI of these referrals is shown in Attachment C. Attachment C shows that OI conducted investigations in about 30% of the cases referred. Concurrently, the seven denials indicate that about 7% of the referrals were not appropriate for OI consideration. The remainder (55 cases) were treated as inquiries; this represents about 65% of the cases. On an annualized basis, OI conducted the equivalent of about 21 investigations prior to IRB and the equivalent of about 46 inquiries annually prior to the IRB.

The data since IRB formation is not readily addressed because it is not fully known at this time as to whether OI has instituted inquiries or investigations in response to all the cases referred to OI since 11/10/86. Assuming that all 14 cases are investigated, this would be equivalent to about 31 cases annually.

Consequently, recognizing the assumption noted above, since the IRB was formed about 31 investigations should be initiated annually compared to 21 investigations and 46 inquiries initiated prior to the IRB during the period of interest examined.

ENCLOSURE 5

Attachment A

Regional Referrals Provided to OI by Region
(9/85 - 11/10/86)

	I	II	II (Excluding TVA)	III	IV	V
9/85	3	2	(2)	0	0	0
10/85	1	1	(1)	1	1	2
11/85	3	1	(0)	2	0	1
12/85	0	1	(1)	0	0	1
1/86	1	1	(1)	0	0	0
2/86	2	5	(0)	2	2	3
3/86	1	2	(0)	1	0	2
4/86	0	0	(0)	0	1	2
5/86	1	6	(4)	2	1	0
6/86	0	3	(1)	1	1	2
7/86	0	3	(0)	0	2	2
8/86	2	4	(2)	0	0	0
9/86	0	0	(0)	0	1	1
10/86	0	1	(0)	1	4	1
11/10/86	0	1	(0)	0	2	0

ENCLOSURE 5

Attachment B

Regional Referrals Provided to OI by Region*
(11/10/86 - 4/9/87)

11/10/86	0	0	1	0	0
12/86	0	1	1	0	0
1/87	0	0	1	0	0
2/87	0	0	1	1	1
3/87	0	0	1	1	0
4/29/87	2	2	1	0	0
TOTAL:	2	3	6	2	1

*Includes emergency referrals and those reviewed by IRB.

ENCLOSURE 5

Attachment C

Disposition of Regional Referrals Provided to OI by Region
(9/85 - 11/10/86)

Region	I	II	II (Excluding TVA)	III	IV	V
Total	14	31	(12)	10	15	17
Inquiries	12	24	(7)	2	5	12
Investigations	2	2	(1)	8	8	5
Denials	0	5	(4)	0	2	0

ENCLOSURE 6

Tabulation of Selected Cases Closed Administratively by OI

On March 13, 1987 Region III Field Office Director (OI) administratively closed 15 cases. The following is a tabulation of the case number, original referral date, and age:

OI Case#	Original Referral Date	Age (Months)
3-84-15	07/84	32
3-84-22	11/84	28
3-84-03	02/84	37
3-84-17	08/84	31
3-84-09	03/84	36
3-84-02	01/84	38
3-84-13	05/84	34
3-86-01	02/86	13
3-86-07	05/86	10
3-85-01	12/84	27
3-85-06	02/85	25
3-85-14	08/85	19
3-82-57	08/82	55
3-84-08	01/84	38

ENCLOSURE 7

Summary of 13 Cases Not Recommended for Investigation Referral by IRB

IRB 86-006 was the only IRB denial. The case involved transportation of radioactive material licensed by an agreement state which the region believed was not performed in accordance with Federal statutes. The information for the referral was provided by agreement states based on a license application. The region was concerned that the radioactive material had been lost and that the applicant in question had indicated it had been transferred outside the United States. Consequently, the referral request was to establish facts associated with the apparent violation by an individual of Federal statutes preventing transfer outside the United States. This case highlights the need to consider health and safety issues first. In response to IRB questions, the region was not able to address: (1) the nature of the radioactive material, (2) its location, or (3) remedial measures that would prevent inadvertent releases. As a result of IRB questions it was determined that the nature of the radioactive material and associated transport were in accord with applicable Federal requirements. Although the OI field office had already initiated its own field work, facts brought to light as a result of the IRB questions and subsequent coordination with OGC indicated that NRC requirements had not been violated and, therefore, no regulation had been broken. Subsequent coordination among the responsible program office, the headquarters enforcement staff, OGC, and the region established that there was no regulatory need for an OI investigation or inquiry. Of primary importance, this case highlighted the need for the technical staff to thoroughly consider public health and safety impacts. A previous experience with material lost in Mexico resulted in serious technical and political ramifications. The case was denied as an investigation. Subsequently, the staff and OI working with the affected agreement states located the material. Circumstances associated with the retrieval may have led to the identification of information that warrants an OI referral. It becomes the responsibility of either the region or OI to initiate further action. None has been identified to date.

IRB 86-002 involved potential falsification of QC inspection activities by a TVA quality control inspector. Regional inspectors were already collecting data and the NRC TVA Senior Management Review Team had asked OI to assist. At the time of the IRB meeting, the region informed the IRB that its inspectors were in the field accompanied by an OI investigator. Consequently, the IRB recognized this as an OI assist to the staff in the development of information that could result in a sufficient basis, other than an allegation based on suspicion, to initiate a subsequent investigation. Consequently, the case was deferred pending additional information that would support a request for investigation. The OI field office nonetheless initiated an inquiry based on the region's request to the IRB. The results of that OI effort indicated that no wrongdoing could be found. Although the request to the IRB was reviewed in early December 1986, the OI's written report was not available until March 30, 1987.

IRB 86-003 involved a contractor at a reactor site who claimed he was fired after raising safety concerns to the NRC. It was not clear whether there was a need for regulatory action in this case because the matter was publicly known and the concerns raised did not deal with a safety matter. The issue resulted from a DOL decision and the licensee was aware of it. Consequently, the issue was not whether the licensee had intimidated the contractor but whether the required corrective action was properly instituted. The IRB asked the region to: (1) report on corrective actions the licensee had taken to address the so-called chilling effect on contractor or licensee personnel who contact the NRC and (2) to assess the licensee program for informing contractor personnel of their rights to contact NRC. This case highlights the need to first establish whether or not a need for regulatory action exists since the IRB concern related to how the information developed by OI would be used. The case was deferred.

IRB 87-001 involved a concern expressed by employees at a licensed facility during congressional testimony in August 1986 that, as a result of their testimony, the licensee would discriminate against them in the future. OI had previously investigated the same employees and others, before the congressional hearings, and concluded that there was no wrongdoing. The regional request to the IRB was sent in January 1987. In response to IRB questions about the basis for the concern and whether the resident inspectors or other NRC staff had observed or been approached by concerned employees, the region indicated that the sole basis for the request was the testimony before a House subcommittee. The IRB found no reasonable basis to conclude that wrongdoing had occurred and encouraged the region to discuss the matter with its inspectors who were present at the site daily to find out if the employees' concerns expressed in the testimony about five months earlier had been realized. At the time of the IRB meeting, no one had yet talked to the individuals who presented the testimony. This case highlights the need for closer coordination between the regions and the program office to ensure some basis, other than speculation or suspicion, that potential wrongdoing existed or exists. The case was deferred pending the development of further information.

IRB 87-004 through 87-011 involved eight materials licensees who could not be located by the regional staff. It was presumed that the licensees had abandoned their facilities without notifying the NRC. Before the IRB was established, the regional office asked OI to locate these licensees. OI had rejected this request and recommended that the region resubmit a request for each docket. Hence, one request was resubmitted as eight referrals during the IRB trial period. In response, the responsible program office was contacted, two other regions with responsibility for more than 60% of materials cases nationwide were contacted, and the IRB established that the practice of using OI investigations to locate missing materials licensees was not used in larger regions. The reason given in this instance was that investigators had more credibility with selected Federal and State agencies which could be presumed to have more complete data. The experience of smaller materials licensees not notifying the NRC when they sell or abandon their licensed materials is not unique to one region. This case highlighted the need for closer coordination with the program office to develop an approach for unique problems that do not necessarily involve serious safety issues. It becomes the burden of the staff to establish a reasonable basis for believing wrongdoing exists/existed. In this case, the use of OI investigators seemed premature unless a need for regulatory action existed. The referral represented a request for resources rather than for an investigation. Consequently, these cases were deferred pending development of a basis, in consultation with the program office.

IRB 87-018 involved a previous problem at a TVA facility. An individual working for a contractor to TVA alleged that the contractor was not performing the assigned safety review task. The individual had been previously removed from his job, had appealed to the Department of Labor, and had lost his appeal. The information relating to this allegation is publicly available. In accordance with the established NRC policy on allegations, the IRB recommended referral of the case to the licensee. It was noted that the TVA Inspector General (IG) is actively involved in similar cases. The allegation related to contractor performance and did not apparently involve wrongdoing by licensee personnel. Accordingly, the IRB recommended, and the Deputy Director, OSP, agreed, deferral of the case pending further review by the TVA IG and the NRC followup.

ENCLOSURE 8

UNITED STATES
NUCLEAR REGULATORY COMMISSION
REGION I
631 PARK AVENUE
KING OF PRUSSIA, PENNSYLVANIA 1940

April 10, 1987

MEMORANDUM FOR: James M. Allan, Region I
J. Nelson Grace, Region II
A. Bert Davis, Region III
Robert D. Martin, Region IV
John B. Martin, Region V
James M. Taylor, DEDRO
Thomas E. Murley, NRR
Hugh L. Thompson, NMSS
James P. Murray, OGC
James G. Keppler, SPO

FROM: Richard W. Starostecki, Chairman, IRB

SUBJECT: PROPOSED IRB RECOMMENDATIONS

As a result of IRB activities over the past six months, in particular the two-day joint working meeting with the Regions on March 17 & 18, 1987, a number of issues and concerns relating to OI referrals have been discussed. The issues that have been most recurring were addressed by the IRB members and as a result we have prepared the attached "Proposed IRB Recommendations". Prior to preparation of a final set of recommendations to the EDO, I request your constructive review, comments and suggestions on the attached.

A response by April 27, 1987 would be appreciated.

Richard W. Starostecki
Richard W. Starostecki, Chairman
Investigation Referral Board

Enclosure:
As stated

cc: B. Hayes, OI
J. Lieberman, IRB Member
J. Zerbe, IRB Member
R. Burnett, IRB Member
F. Miraglia, IRB Member
J. Sniezek, NRR
T. Rehm, EDO

PROPOSED IRB RECOMMENDATIONS

1. OI and the staff should be encouraged to coordinate their activities at all levels. It is the view of the IRB that the activities of the IRB would have been expedited and enhanced by the participation of OI staff. Closer working relationships should be fostered such that the agency's objectives are attained with a clear understanding by OI and staff of their respective roles. Most matters identified as potential wrongdoing need to be followed or pursued far enough to adequately address potential safety concerns. The distinction between "wrongdoing" and "safety impact" will not always be clearly identified, nor in some cases can it. The regulatory needs of this agency are at times not considered sufficiently because of the perception that "this is ours" and "that is theirs". Consequently, the respective staffs must work together until the regulatory and wrongdoing issues are clearly established.

2. There are instances when staff inspections can benefit from the participation by OI staff. Such assistance from OI is generally needed on short notice and is not conducive to review by a board. There is a need to clearly distinguish between requests for OI investigations and OI assistance. OI assistance refers to those situations where there is a need for OI support to an inspection (e.g., conduct of an interview) to collect additional data or information so that a reasonable determination can be made as to wrongdoing and whether there is a regulatory need. OI assistance requests appear to be the type of OI effort that may not be

resource intensive and for which OI may be able to provide prompt support to the staff. Requests for OI assistance by Regional Administrators have not always been routinely honored by the OI field office. Based on Regional experiences the field offices do not distinguish between investigations and assistance support in that written referral requests have been sought before initiating any field work. OI guidance to their field offices on this issue is needed to assure a consistent response.

3. To foster closer coordination between OI and staff, OI staff should be encouraged to attend pertinent Regional enforcement conferences, allegation panel meetings, or management meetings. OI should not self-initiate inquiries or investigations without coordinating with the Regional Administrator or the Program Office to assure completion of the staff's deliberative process. That is, if the staff decides at an allegation panel meeting that a referral is warranted and an appropriate request is forwarded for the Regional Administrator's signature, OI should not initiate its effort pending receipt of a specific request. It is the clear definition of the regulatory need that evolves from the deliberative process; to assure that the appropriate regulatory need will be satisfied by the OI effort, close coordination between OI and the staff during initiation as well as during the conduct of the investigation should be encouraged.

4. OI and Regional staff should be encouraged to provide feedback more routinely. The development of additional technical information resulting from certain OI investigative efforts can impact the regulatory need and attendant regulatory action. Consequently, the presence of a technically knowledgeable individual on selected OI efforts would enhance the utility of the OI results and provide more meaningful feedback upon which changes could be considered in the priority, need for and direction of the investigation. Conversely, OI presence on certain staff inspections could provide additional perspective to the staff. To assure feedback is attained, OI field offices and Regional managers should hold at least quarterly briefings on status of activities in progress. These quarterly briefings should also result in a regional prioritization of cases.

5. The concept of an emergency OI referral should be retained. Guidance needs to be developed for the Regional Administrators as to the threshold of such requests and the need for coordination with the respective Program Office. Emergency referrals are infrequent (four in six months) and do not appear to impose an administrative burden on the staff. Their treatment reflects the urgency of the matter and its immediate potential impact on public health and safety. Program office emergency referrals could similarly be directly provided to OI. Subsequent notification of the EDO Office on all emergency referrals is necessary. Alternatively, emergency referrals could be reviewed by the Deputy EDO for Regional Operations. Emergency referrals to date have been coordinated with the IRB Chairman by telephone; this coordination should be continued with the

respective Program Office, and a copy of the final written request should be forwarded to the review board for information.

6. Retain the concept of a national priority listing that is periodically updated. Every six months, all outstanding OI cases should be reevaluated for their regulatory need and priority. A review board consisting of SES-level managers from the EDO Office, NMSS, NRR, Regions and OI should reassess from a national priority all cases such that a prioritized tabulation is provided to OI. The Deputy EDO for Regional Operations could be the Chairperson. A quarterly review of all outstanding cases by a board with a national overview would be very resource intensive. Quarterly reviews at the regional level with subsequent 6 month board reviews appears to be more useful.

7. The Commission's guidelines of January 10, 1986 for requesting and prioritizng investigation requests are adequate subject to consistent interpretation of safety concerns. The guidelines address safety concerns in the licensing process and this has been taken by the IRB to apply in the broad context of safety concerns in the regulatory process which does not discriminate between licensing and inspection. The term "licensing" has on occasion been read narrowly and applied primarily to NTOLs in the licensing process. The form used by the staff to request an investigation should be modified in certain respects. First, it should include in the prioritization request a reference to the applicable subparagraph of the guidelines which best matches the rationale for the

priority. This would enhance more consistent and uniform application of the guideline. The form should also be revised to include a short statement to solicit the safety significance of the issue. Third, the form should solicit a brief description of inspection activities and/or enforcement activities. In many IRB cases, the requests for referrals have been approved after additional information has been identified as being pertinent and the formal request revised to more clearly identify the problem warranting OI investigation.

8. The IRB process has fostered improved communication and coordination among the Regions and between the Regions and Headquarters. OGC and DEDROGR participation has been valuable in providing constructive suggestions and recommendations; the synergism of the IRB discussions has been most beneficial and the consensus decisions of the IRB have resulted in no cases being contested by any requesting Region or Office. Although the IRB process was at times very disruptive to individuals because of the time constraints (routine meetings usually required 2-3 hours), the level of involvement was desirable in light of the variety of issues. Due to extenuating circumstances, the Deputy Office Directors for NRR and NMSS were able to participate in only a few meetings. Consequently, NRR and NMSS participation was generally at the Division Director level. Accordingly, a board made up of SES-level managers could continue to provide the function of the IRB. The IRB focused its attention on the regulatory need and priority of each case. OI was invited to each meeting but never attended. Some OI field offices participated by

telephone on occasion. More active OI involvement in this process would have been beneficial because of their insights on what constitutes wrongdoing and their views of how far inspections can occur before they might interfere with a future investigation. Nonetheless, the IRB approach to reviewing each case was successful in that the regulatory need was more fully considered and prioritization was more uniformly and consistently assigned in accordance with the Commission's guidelines. As a result, there are two options that warrant consideration for the IRB:

Option A

The IRB function could be transferred to the Program Offices. The function of the IRB of reviewing the priority and the adequacy completeness of the specific request could be reassigned to the respective program offices. Prior to referral to OI, Regional reactor cases should be reviewed with NRR and materials cases with NMSS. Each Program Office could establish a SES-level board with OGC and/or DEDRO participation. For example, NRR could constitute a quorum with a 3 person board made up of a Division Director, OGC, and DEDRO representatives. Similar restrictions on timeliness, within two weeks of receipt, should be stated for considering requests. Program office referrals could be similarly referred to OI by the program office after board review. TVA and Comanche Peak issues should similarly be considered by a board; it is suggested that the Special Project Office have a participating member on the NRR board.

Option B

Retain the IRB as constituted with representation from NMSS, NRR, DEDRO and OGC. The IRB Charter could be retained but representation from the offices should not be limited to Deputy Office Directors; members could be Division Directors, or higher.

ENCLOSURE 9

COMMENTS PROVIDED ON PROPOSED IRB RECOMMENDATIONS

On April 10, 1987, 5 months after the inception of the IRB, proposed recommendations were developed by the IRB and provided to the Regional Administrators, Program Office Directors, the Director, Office of Special Projects (OSP), the Deputy Executive Director for Regional Operations and the Office of General Counsel for review and comment. These comments are attached.

The commenters were in general agreement and supportive of the recommendations, with some modifications. Disagreements however, were noted. The Director, OSP does not agree that IRB should continue. The Administrator, Region II does not believe that each individual referral should be reviewed in advance by an IRB. The proposed recommendations also identified the option of more direct program office review of each referral in lieu of the IRB. This option was generally not supported due to the need for more interactions by each region.

The general benefits stated by the commenters include:

1. The establishment of a national priority was reviewed as needed. As noted by Region II, if pending cases are reduced so that OI can complete investigations more quickly, there would be a better likelihood that appropriate regulatory action, such as enforcement, could be taken more timely. Concurrently, Region III also noted that a major percentage (80%) of the highest priority cases nationwide were in Region III.

2. There was agreement that the IRB process provided a consistent application of the Commission's threshold for requesting investigations.

3. The IRB improved the staff's appreciation for clearly stating the regulatory need for an investigation.

4. The IRB promoted improved communication and feedback among Headquarters, the Regions and OI.

Highlights from each commenter are provided.

Region I

The Administrator, Region I, supported the recommendations and indicated that they are appropriately aimed at encouraging better coordination between the staff and OI. The option of retaining a single board, weighing both reactor and material referrals from a national perspective, was preferred.

Region II

The Administrator, Region II, highlighted a number of benefits achieved by the IRB process but did not believe that the need for a review board, which reviews referrals in advance of formal submittal to OI, is warranted. It was stated that:

1. The IRB helped foster a better understanding of priorities from an agency-wide perspective;
2. The need for enhanced cooperation between OI and the regional staffs should be fostered;
3. Program offices should have more active participation in a passive oversight role;
4. Steps should be taken to review and reduce the backlog of pending OI cases so as to provide more timely support to the regions for those cases that have a high probability of resulting in enforcement action; and
5. A periodic review and updating of a national priority listing of pending cases should be continued.

Region III

The Administrator, Region III, made a number of comments. There is agreement with the concept of a review board to prioritize investigations and OI should attend board meetings. Selected comments include:

1. Close coordination between regional staff and OI is essential.
2. Guidance should be provided to OI field offices for providing assistance of a short term nature, as contrasted with an investigation. Use of OI to scope issues is beneficial;
3. OI should not be restricted from self-initiating investigative efforts;
4. The concept of emergency referrals should be retained. Guidance to the Regional Administrator for classifying emergencies should be provided; coordination with senior headquarters officials should occur on emergency referrals; and
5. Region III caseload after completion of the IRB process, including development of a national priority listing, included 80 percent of the highest priority cases nationwide; it was implied that reallocation of OI resources is warranted to deal with this.

Region IV

The Administrator, Region IV, proposed a revision to the modifications developed by the Commission relating to the definition of wrongdoing. Furthermore, he suggests a definition be developed for the terms "careless disregard" and "reckless indifference". Another issue addressed deals with the treatment of allegations. Region IV prefers more definitive guidance than currently exists as to who is responsible for establishing whether there is a reasonable basis for believing that an allegation does in fact involve wrongdoing. Finally, Region IV endorses the concept of maintaining and updating a national priority listing of pending cases.

QUESTION 16. (continued) - 7 -

(H) Why was the IRB "dis-established"?

ANSWER:

The IRB served its purpose of providing senior management oversight for the implementation of the Commission's guidance on the thresholds for requesting investigations and priorities of investigations. The IRB served a quality assurance function for the referral process. The IRB was established on a trial basis and, after an evaluation of its operations by the EDO, it was decided that it was no longer needed. The consideration of priorities on a national basis has been continued through periodic meetings of OI and staff officials in the Investigative Priority Review Group.

QUESTION 17: Although the IRB has been "dis-established," the NRC initiated the Investigation Priority Review Group.

(A) What is the charter of this body?

ANSWER:

The charter is attached.

QUESTION 17(A) Attachment

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

SEP 15 1987

MEMORANDUM FOR: Those on Attached List

FROM: Victor Stello, Jr.
Executive Director for Operations

SUBJECT: SYSTEM FOR PERIODICALLY PRIORITIZING INVESTIGATIONS

The Investigation Priority Review Group (IPRG) is being established to consider the priorities for investigations of wrongdoing on a national basis. Matters of wrongdoing involve varying degrees of potential or actual safety significance. Therefore, NRC limited investigatory resources make a periodic agency wide review of investigation priorities necessary to assure that the investigatory resources are focused on the most important safety issues.

The composition and responsibilities of the IPRG are set out in the attached Investigation Priority Review Group Charter. Initial working arrangements for the IRPG are also attached to this Memorandum. The IRPG Chairman may revise these initial working arrangements as necessary. The Office of Investigations has been involved in developing the plans for the IPRG and the Director of OI supports this approach.

The Investigation Priority Review Group and the system for periodically reviewing and prioritizing requests for investigations will be effective September 30, 1987.

Victor Stello, Jr.
Executive Director for Operations

Enclosures: As stated

cc: B. Hayes, OI
S. Connelly, OIA
T. Rehm, EDO

WORKING ARRANGEMENTS FOR THE INVESTIGATION PRIORITY REVIEW GROUP (IPRG)

The Director, OE, will provide staff support for the IPRG. This support will include (1) providing the reference and working materials necessary for the functioning of the Group, (2) preparing IPRG reports for the approval of the Group Chairman, and (3) performing such other IPRG functions as the Group Chairman may direct.

The IPRG will meet during the first month of each calendar quarter as scheduled by the Deputy EDO. At least 30 days before the scheduled quarterly meeting, OE will provide Regional Administrators and Office Directors a copy of the last national ranking made by the IPRG and a list of referrals made by the region or office since the last national ranking. The last national ranking developed by the IRB will be used for the initial Group meeting. The list of referrals will be grouped by the priorities designated in Manual Chapter 0517. Regional Administrators and Office Directors will review the OI referrals made by them on the list provided by OE and further rank the referrals using the following guidance. Within the High priority, rank according to Upper, Medium, and Lower. Within the Normal priority, rank according to Upper and Lower. No further ranking of cases within the Low priority is necessary. Outstanding OI case will also be reprioritized by the Regional Administrators and Office Directors who originally made the referral.

The Regional Administrators and Office Directors will also request from the appropriate OI Field Office Director, a status for OI investigations regarding (1) whether the case is a full investigation or an inquiry (Q case), (2) the percent of field investigative work completed for all outstanding OI cases, (3) a list of the OI cases closed, and (4) cases opened since last IPRG meeting with assigned priority. Regional Administrators and Office Directors will (1) annotate the national ranking lists provided by OE with the priority information regarding new referrals, (2) annotate the status of OI cases including the percent of field work completed, and (3) return the annotated lists to OE by the close of business, 10 days before the scheduled IPRG meeting.

Prior to the IPRG meeting, OE will prepare a "straw man" new national ranking list using the annotated lists from the Regional Administrators and Office Directors. In preparing the straw man list, OE will include the percent of the field investigative work completed, line out those cases that have been completed or administratively closed since the last national ranking, and include a brief "one line" description of the cases.

At the IPRG meeting, Group members will review the straw man national ranking list and develop a revised national ranking. After the IPRG meeting, OE will prepare a report of the Group meeting, including the new national ranking, and issue a report, after approval by the IPRG Chairman, to the organizations indicated in the IPRG Charter.

Attached List

J. M. Taylor, DEDO
H. L. Thompson, NMSS
T. E. Murley, NRR
E. S. Beckjord, RES
W. T. Russell, RI
J. N. Grace, RII
A. B. Davis, RIII
R. D. Martin, RIV
J. B. Martin, RV
J. G. Keppler, OSP
W. Parler, OGC
W. G. McDonald, ARM
H. Denton, GPA
E. L. Jordan, AEOD
J. Lieberman, OE
S. Sohinki, OGC

Charter for the Investigation Priority Review Group

I. PURPOSE

To review quarterly each open investigation:

1. The assigned priority (high, normal, low), and assure the priority is consistent with program and overall agency needs, and

2. The schedule when the results of the investigation are needed to support regulatory action.

II. Membership

Deputy Executive Director for Operations (Group Chairman)
Office Director, NMSS
Office Director, NRR
Director, OI
Assistant General Counsel for Enforcement, OGC (Advisory Member)
Director, OE (Advisory Member)

If Group members are unable to attend a meeting, they should appoint their deputies or acting office directors to substitute for them.

III. Meetings

Meetings will be conducted quarterly during the first month of each calendar quarter as scheduled by the Group Chairman. It is expected that the meeting will include Regional Administrators, Director, OSP, and OI Field Office Directors representation, via conference call.

IV. Staff Support

The Office of Enforcement will provide staff support for the Investigation Priority Review Group. This support will include (1) advising the Group regarding the application of the policies in Manual Chapter 0517, Appendix, Part III, (2) providing the reference and working materials necessary for the functioning of the Group, (3) preparing the Group quarterly report for the approval of the Group Chairman, and (4) performing such other IPRG functions as the Group Chairman may direct.

V. Report

A quarterly report will be provided to the EDO. The report will summarize the prioritization of open investigations, summarize the status of outstanding investigations, and identify any problems or potential problem areas. Copies of the report to the EDO will be provided to the Commissioners, the Directors, NRR, NMSS, OGC, OE, OI, OSP, and the five Regional Administrators.

QUESTION 17. (continued)

(B) Is the OI Director a participating member of the new body? If so, what are his responsibilities?

ANSWER:

Yes. The Director of OI has the same authority as any other member of the board.

QUESTION 18. In April 1987, the OI Director submitted SECY 87-93 to the Commission.

(A) For what specific reasons did the OI Director submit the SECY paper to the Commission?

(B) What events led to submitting the document to the Commission?

ANSWER

SECY-87-93 arose out of an OI concern that certain Staff and Commission actions taken from 1986 on had the effect of creating confusion regarding the scope of OI authority and responsibility. Two actions in particular - Commission approval of SECY-85-369 regarding the initiation, establishment of priorities, and the termination of investigations, and establishment of an Investigation Referral Board - appeared to the Director, OI to conflict with long standing OI policies and procedures, particularly in such areas as the authority of the Director, OI, to initiate investigations, or the obligation of NRC employees to report wrongdoing matters to OI. The need for clarification became evident to the Director, OI, in February 1987 when controversy over OI self-initiation of an investigation over the objections of some Staff officials led to at least one Commissioner severely criticizing the OI actions.

(C) What did the OI Director ask for in the SECY paper?

ANSWER

OI asked, (1) that the Commission reaffirm OI's authority and responsibilities, and (2) that the Commission direct OI and the Staff to develop joint guidance to ensure that all NRC employees are informed of the scope of OI authority and responsibility so that all matters of wrongdoing are brought to OI's attention. The paper was withdrawn without Commission action at OI's request.

In April 1987, the OI Director submitted SECY 87-93 to the Commission.

(D) What arrangements were reached as a result of the management meeting held to discuss the SECY paper?

ANSWER

The Director, OI, and his staff met with the Commission on July 29, 1987, to discuss SECY-87-93. During that meeting, the existing 27 OI Policy Statements previously approved by the Commission and the authority of OI to self-initiate investigations were discussed. Prior to that management meeting, but subsequent to the submission of SECY-87-93, the Investigation Referral Board was disestablished, and the Commission announced that neither Commission nor Office of General Counsel review of proposed OI referrals to the Department of Justice would be required. OI submitted SECY-87-93A, which formally withdrew SECY-87-93. OI's withdrawal of SECY-87-93 was based on its understanding that OI's concerns had been resolved.

QUESTION 19. What NRC document(s) define the procedures for conducting investigations under OI's jurisdiction?

(A) Define the thresholds for conducting OI investigations.

ANSWER

The thresholds for conducting OI investigations are found generally in Part III. B.1. of the Appendix to NRC Manual Chapter 0517. The threshold for a Staff investigative request is a reasonable basis for belief of wrongdoing and a Staff determination that an investigation is necessary for enforcement or other regulatory action. The Director, OI, may self-initiate an investigation based on reasonable belief of wrongdoing on a matter within NRC purview in accordance with OI Policy 4.

QUESTION 19. (continued) - 2 -

(B) Define the priorities for conducting OI investigations.

ANSWER

Investigative priorities are initially assigned by the requestor of an investigation in accordance with the guidance in NRC Manual Chapter 0517. OI normally accepts this assigned priority. Additionally, the Investigation Priority Review Group meets periodically to ensure that investigations have been properly prioritized from a national perspective. The Commission has formalized in NRC Manual Chapter 0517, Part III, guidance for establishment of priorities for, as well as initiation and termination of, investigations. A copy is attached.*

*Previously submitted for the record.

QUESTION 20. Who has the ultimate authority, within NRC, to open a full-scale investigation under OI's jurisdiction? Who has the primary responsibility to determine whether or not an OI investigation is needed?

ANSWER

Ultimate authority rests with the Commission. Although the EDO and Regional Administrators may request investigations, only the Commission may direct OI to open an investigation. Except where the Commission may direct initiation of an investigation, the Director, OI, determines whether or not to initiate an investigation. Authorized requestors have a responsibility to request OI investigations when the threshold criteria of NRC Manual Chapter 0517 are met. The authority of the Director, OI, to self-initiate investigations is addressed in our response to Question 16(A).

QUESTION 21. Has the Commission ever denied an OI request to initiate an investigation under its jurisdiction? If so, describe the specific incidences and why the request(s) were denied.

ANSWER

The Commission has never denied an OI request to initiate an investigation under its jurisdiction.

QUESTION 22. Please explain the relationship between wrongdoing and safety issues in the context of OI's responsibilities to investigate wrongdoing. In the Commission's view, does wrongdoing always have safety significance? Does OI share the Commission's view of the relationship between wrongdoing and safety issues?

ANSWER

NRC prescribes requirements to protect public health and safety. Normally, wrongdoing as it occurs under the purview of NRC involves a deliberate violation of NRC requirements. Wrongdoing or deliberate violations are of significance because they reach to the character, reliability, and integrity of the licensee individuals involved. The potential significance to safety is also gauged by the position and responsibilities of the person involved. For example, wrongdoing on the part of a nuclear plant manager is clearly more significant than wrongdoing by a firewatch.

The Commission cannot prejudge the safety significance of each case of wrongdoing. The safety significance of wrongdoing also varies depending upon the specific requirement violated. Each case is reviewed on its merits. For example, wrongdoing could span deliberately concealing incapacitated systems vital to reactor safety all the way to falsification of logs used to record the routine tours of fire watches.

OI offers the following observations regarding the interrelationship of wrongdoing and safety:

QUESTION 22. (continued) -2-

The nuclear industry is largely self-regulating. For the most part, our regulatory assumption is that most licensees will comply voluntarily with NRC requirements, and that their commitment to the protection of the public health and safety is as vigorous as that of the NRC. OI does not disagree with this assumption. But this is what makes character and integrity so important. The NRC must be able to rely on persons in the industry to comply with, not circumvent NRC requirements. Industry employees who engage in deliberate violations of NRC requirements represent a potential safety threat in terms of their unreliability.

It is difficult enough for NRC inspectors to detect non-compliance when it is not deliberate given NRC resource constraints. When such violations are done on purpose, and covered up, such non-compliance is highly unlikely to be discovered during routine inspections. Whatever character traits that may lead licensee employees to commit such violations render them untrustworthy for regulatory safety responsibilities.

Thus, it is OI's view that wrongdoing, as defined by the NRC, generally has safety significance.

QUESTION 24. In his October 8, 1987, testimony before the Subcommittee, Mr. Hayes noted OI's mission of providing thorough, objective, and timely reports to the staff to assist them in making regulatory decisions. What criteria is used to suspend an investigation based upon a regulatory need? Who makes this decision? Please give specific examples of OI investigations that have been suspended.

ANSWER

The Director, OI, may elect to suspend an investigation based on a lack of regulatory need, but this would be an unusual action for the following reason. Virtually all current OI investigations have been carefully reviewed by the Staff and OI prior to initiation. At the time of a staff request for investigation there is a consensus that a regulatory need for it exists. Example of factors that could lead to a decision that a regulatory need for investigation no longer exists would be evidence supporting a reasonable belief that wrongdoing did not, in fact, exist or that the basis of regulatory need no longer exists. Under those circumstances, the assigned investigator would, with the concurrence of his supervisor, discontinue the investigation and write a final report of completed investigation work that would be issued in accordance with standard procedures.

Although the original requestor of an investigation may assert that he or she no longer requires an investigation, the investigation may be discontinued only by the Director, OI, if there was a reasonable belief that there was no wrongdoing.

On the other hand, the Director, OI, may want to close a case due to a requestor's assignment of a lower priority to the investigation. For example, the requestor of an investigation initially assigned a high priority may, based on the belief that the investigative results no longer are necessary, request it be treated as a low priority case. Under those circumstances, the case could become a candidate for OI administrative closure if the priority of the case is such that the investigation will not commence within six months. The practical results of such a Staff action would be to cause the matter to be closed administratively. At that point the staff would be notified and could take further action on its own or request OI to reopen the case with a higher priority if circumstances warrant.

As of December 31, 1987, OI has closed 39 cases administratively.

QUESTION 25. Please provide to the Subcommittee the following data by fiscal year through 1987.

(a) the number of positions requested by OI.

(b) the number of positions requested for OI by the Commission.

(c) the number of positions allocated to OI.

(d) the number of positions allocated to OI by the Congress.

ANSWER

The Office of Investigations (OI) was established in mid 1982 and allocated a personnel ceiling of 38 full-time equivalent (FTE) staff. The FY 1983 personnel ceiling for OI was also 38 FTE. The table below shows the Commission's FY 1984-1988 budget requests to OMB, and the Congress and the Commission's allocation of positions for OI.

Fiscal Year	Commission Rqst to OMB	President's Budget Rqst[a]	Allocated Positions
	FTE	FTE	
1982	-	-	38
1983	-	-	38
1984	42	38	38
1985	49	49	38[b]
1986	38	44	44
1987	44	44	45

---

[a] Congressional Authorization Act and Appropriations Act did not reduce the President's Budget request for the Office of Investigations.

[b] The Office of Investigations personnel ceiling was held to 38 FTE's until FY 1986. (See attached 1/24/85 memo from C. Kammerer to J. Asselstine.)

1/27/88 BREAUX Q25

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555

QUESTION 25 Attachment

U.S. NRC

JAN 25 PM 2 27

January 24, 1985

MEMORANDUM FOR: Commissioner James K. Asselstine

FROM: Carlton Kammerer, Director
Office of Congressional Affairs

Kammerer

SUBJECT: RESOURCES FOR THE OFFICE OF INVESTIGATIONS

Your memorandum dated January 17, 1985 asked that we provide a legislative history on the Congressional ceiling of 38 positions for the Office of Investigations (OI). This review is provided in response to your request.

As you are aware, the Commission advised our three authorization and two appropriations subcommittees in Congress of its intention to consolidate agency investigative functions in a new Office of Investigations by letter from Chairman Palladino, dated June 10, 1982 (Attachment A). The Chairman's letter was transmitted during FY 1982 after the NRC's FY 1983 budget had been submitted.

The Commission's FY 1982 budget did not include a separate category for investigations. Resources for enforcement, investigations and special programs (including emergency preparedness activities) were identified as a subcategory of the budget for the Office of Inspection and Enforcement. In the FY 1982 budget submission, the request for this category was for 140 personnel. In the FY 1983 budget submission already before Congress, emergency preparedness activities were identified separately so that personnel requirements for enforcement, investigations and special programs were estimated to be at 107 people for both FY 1982 and FY 1983.

The Chairman's June 10, 1982 letter did not specify the number of positions having investigative functions within this subcategory of OIE. It simply stated that present NRC investigative personnel were being transferred into the new office and that additional trained personnel would be hired "within NRC's current personnel ceiling." However, a subsequent letter from Chairman Palladino mentions a "total staff limit of 38 positions distributed among both headquarters and field offices" and this number was previously communicated to the Congressional oversight committees by OCA in response to inquiries.

The House Appropriations Subcommittee on Energy and Water Development responded to the Chairman's advisory letter with a letter, dated June 21, 1982 and signed by both Chairman Bevill and Ranking Minority Member John Myers. The Bevill/Myers letter (Attachment B) acknowledges receipt of the June 10, 1982 letter and states the Subcommittee's view that "staffing levels and budgetary resources for this new office, in excess of levels previously provided for by the Committee, should be submitted for Committee review through the usual reprogramming procedures.'

The Congress did not pass an Energy and Water Development Appropriation for FY 1983. During the fiscal year, the NRC and other affected agencies operated at FY 1982 levels under Continuing Resolution. In January 1983, the NRC submitted its budget request for FY 1984. That budget submission was the first to identify resources for investigations (or OI) as a separate item under Program Technical Support rather than under Inspection and Enforcement Programs.

The FY 1984 request estimated 38 people for OI in FY 1984 and again in FY 1985. The FY 1984 budget justification (Green Book) provided a brief description of OI and indicated that all estimates of people were stated in terms of full-time equivalents (FTEs).

The House Appropriations Committee report on the FY 1984 Energy and Water Development Appropriation Bill (H.Rept. 98-217) made no mention of staffing requirements for OI. It did, however, contain the following language relating to the investigations program:

> "The Committee is concerned with the relationship between the Office of Inspection and Enforcement and the recently established Office of Investigations. The Committee is not convinced that there is any need for a separate Office of Investigations and whether the existence of that separate office in fact is consistent with an integrated investigation and enforcement program.
>
> "The Committee has been advised that the Office of Investigations has not made public their policies and procedures. The Committee directs the NRC to make a report to the Committee regarding the interrelationship of these offices and what legal problems exist that might prevent the publishing of the policies and procedures of the Office of Investigations."

On June 16, 1983, subsequent to the issuance of the House Appropriations Committee report on May 24, 1983, Chairman Palladino wrote to the Subcommittee. His letter (Attachment C) advised that after a year of experience with the new OI, the Commission had concluded that an additional eleven (11) full-time employee positions should be allocated to OI. The following justification was provided in the letter:

> "The number of allegations requiring NRC investigation is substantial and growing. All of them need at least a screening investigation. Our inability to complete investigations in a timely manner may result in a reduction in the level of public safety, licensing delay or both. Such delay is imminent in several complex cases before the Commission."

The Chairman's June 16, 1983 letter states that the proposed reprogramming action would come "from within the overall personnel levels already provided for the NRC for FY 1983" and requested early and favorable consideration of the Commission's request. Not long after the Chairman's letter was sent, OCA was asked to advise the Subcommittee that the Commission was reducing the requested number of positions to be reprogrammed from eleven to six. This was communicated orally to the Subcommittee staff by OCA.

The Subcommittee never provided a written response to the Commission's request and the reprogramming was never implemented. The Congress enacted the FY 1984 Energy and Water Development Appropriation and the assumption on the part of both agency and Subcommittee was that a reprogramming action was required to increase the level of personnel for OI above the FY 1982 level, continued in FY 1983 by Continuing Resolution and requested by the NRC in its budget submission for FY 1984.

Throughout the remainder of FY 1983 and much of FY 1984, Subcommittee staff repeatedly expressed the desire to receive the NRC report on OI called for in the Committee's May 24, 1983 report before taking any action on the Commission's reprogramming request. The called-for report on OI's interrelationship with OIE and what legal problems might prevent publication of OI policies and procedures was not submitted to the Subcommittee until March 14, 1984 -- eight days before its hearing on the NRC's FY 1985 budget request.

The Commission's budget submission for FY 1985 included a summary of estimates for Program Technical Support Programs by function which stated an actual figure for FY 1983 for OI of 36 people, an estimate for FY 1984 of 44 people (presumably reflecting expected acceptance of the Commission's pending reprogramming request for an increase of six people) and an estimate of 49 people for OI for FY 1985. The Chairman's statement made no mention of special needs for OI and the related text in the FY 1985 Green Book was cursory: "Increases in staffing reflect greater emphasis placed on Investigations..."

In conjunction with the Subcommittee's hearing on the agency's budget submission, the Subcommittee asked a number of questions relating to OI. These included a question about whether the Commission planned to move OI under the direction of the Executive Director for Operations. However, there were no questions relating to staffing requirements for the office.

Although both the House Committee bill and the appropriation finally enacted substantially reduced the agency's overall budget request, no specific language was included in either House or Senate Committee report or in the Conference Report that would specifically limit the number of people assigned to OI.

However, on November 7, 1984, the Commission transmitted the agency's initial FY 1985 Base Table (Attachment D) to the House Appropriations Subcommittee and other Congressional oversight subcommittees. The Base Table transmitted to Congress shows adjustments and reductions made in the

- - -

budget as originally submitted by the President and serves as the benchmark for determining reprogramming actions under Reprogramming Procedures previously supplied by the House Appropriations Subcommittee (Attachment E). Footnote 1 to the Base Table describes FTE reallocations including increases and reductions in various programs and "no increase in the number of investigators."

It should be noted that, with respect to the position allocation for OI, the Base Table simply reflects the Commission's budget as submitted to the Office of Management and Budget (and soon to be submitted to Congress by the President), which estimates 36 FTEs in both FY 1985 and FY 1986.

If the Commission wishes to revise this number for OI, it would be advisable to do so before the budget hearing cycle begins and to identify clearly the need for a staffing increase for OI in its budget presentations. In particular, the Commission needs to address the points made in the original reprogramming request of June 1983 in light of our additional experience over the last eighteen months. For example, since the reallocation of staff was not permitted, is there any evidence of either licensing delay or a reduction in the level of public safety as a result?

Last year's House Appropriations Committee report made several references which could be construed as relating to OI and its staffing requirements. These ought to be taken into account in any Commission justification for further personnel for OI.

First, the Committee expressed support for Chairman Palladino's suggestion that NRC develop a policy for handling last minute allegations with a high threshold for the introduction of new allegations, for example, "supported by signed affidavits, and presented in a disciplined way." One effect of such a policy would presumably be to reduce demands on the resources of OI.

Second, the Committee repeated previous "concerns over the NRC establishing duplicative and redundant staffs" noting that "Commission level staff, as opposed to the Agency staff, has now grown to 261 positions." The House report directed NRC "to take immediate action to review this situation and take steps to streamline and improve the management process" stating, without recommending specific manpower ceiling reductions, its expectation that the NRC would implement reductions to Commission level staff prior to submission of the FY 1986 budget. Previous Committee comments have expressed concern about the overlapping duties of OGC and ELD. During the budget hearing, the Subcommittee asked about whether the Commission still planned to put OI under the direction of EDO, about the training OI investigators may have had in nuclear safety or nuclear operations, and about steps NRC had taken to assure the safety significance of any violation uncovered by OI. Taken together with the Committee's previous request for a study of the interrelationship between OI and OIE, these questions reflect a continuing uneasiness on the part of the Committee about the apparent isolation of the OI investigative staff currently reporting to the Commission from NRC's inspection and enforcement activities under the supervision of the EDO.

cc: Chairman Palladino
Commissioner Roberts
Commissioner Bernthal
Commissioner Zech
OGC
OPE
EDO
OI
SECY

Attachment A

CHAIRMAN

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

June 10, 1982

The Honorable Mark Hatfield, Chairman
Subcommittee on Energy and
 Water Development
Committee on Appropriations
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

In an effort to upgrade NRC's investigative capabilities, the Commission is taking steps to consolidate NRC's investigatory functions in a new Office of Investigations (OI). The new Office will, for the time being, report directly to the Commission and will be responsible for investigating all allegations of wrongdoing by individuals or organizations other than NRC employees or contractors. The Office will develop policy, procedures and quality control standards for the conduct of all OI investigations and will ensure that all OI investigators are properly trained.

Present NRC investigative personnel in the Office of Inspection and Enforcement and in the Regional Offices are being transferred to the new Office. It will be headed temporarily by Mr. James Fitzgerald, an Assistant General Counsel, until a permanent director can be hired. Additional trained personnel will be recruited for the new Office within NRC's current personnel ceiling.

The Commission believes that restructuring NRC investigative activities to provide a more centralized and high-level focus is urgently needed. Our plans essentially involve the reorganizing and upgrading of existing activities rather than an embarkation on any new programs or activities. We believe that our objectives can be accomplished within existing NRC funding and personnel levels for FY 1982.

We will, of course, continue to keep you apprised of significant Commission efforts in this and other areas of interest and importance.

Sincerely,

Nunzio J. Palladino

Nunzio J. Palladino

cc: [redacted]

21

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PDR FOIA
KOL183-560 PDR

MIE L. WHITTEN, MISS.

Congress of the United States
House of Representatives
Committee on Appropriations
Washington, D.C. 20515

Cornell
Rehm
Barry
Stello
DeYoung
OIA
OI
EDO R/F

June 21, 1982

Honorable Nunzio J. Palladino
Chairman
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Dear Mr. Chairman:

We have reviewed your letter of June 10, 1982, concerning the reorganization of NRC's investigatory functions into a new Office of Investigations reporting to the Commission. You note that additional trained personnel will be recruited for the new office within NRC's current personnel ceilings.

While we commend your efforts to improve NRC's operations, it would appear that the staffing levels and budgetary resources for this new office, in excess of levels previously provided for by the Committee, should be submitted for Committee review through the usual reprogramming procedures.

Sincerely,

John Myers

John T. Myers
Ranking Minority Member
Subcommittee on Energy
and Water Development

Tom Bevill

Tom Bevill, Chairman
Subcommittee on Energy
and Water Development

DCA for appropriate action.........cc; EDO, RF..........SECY-82-0660

Attachment C

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

CHAIRMAN

June 16, 1983

The Honorable Tom Bevill, Chairman
Subcommittee on Energy and Water
Development
Committee on Appropriations
United States House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

A year ago, I advised you by letter that the Commission was consolidating its investigative functions in a new Office of Investigations, which would report directly to the Commission and which would be responsible for investigating all allegations of wrongdoing by individuals or organizations other than NRC employees or contractors.

In my letter to you, dated June 10, 1982, I indicated that our plans essentially involved a restructuring and upgrading of on-going investigative activities and that the Commission believed its objectives could be met within existing NRC personnel levels for FY 1982, i.e. within a total staff limit of 38 positions distributed among both headquarters and field offices.

After a year of experience, we have concluded that an increase in our investigation staff is needed. The number of allegations requiring NRC investigation is substantial and growing. All of them need at least a screening investigation. Our inability to complete investigations in a timely manner may result in a reduction in the level of public safety, licensing delay or both. Such delay is imminent in several complex cases before the Commission.

Therefore, we propose to reallocate an additional eleven (11) full-time employee positions to the Office of Investigations for this purpose. This proposed reprogramming action will come from within the overall personnel levels already provided for the NRC for FY 1983.

Your early and favorable consideration of this reprogramming action is requested.

Sincerely,

Nunzio J Palladino

Nunzio J. Palladino

cc: Rep. John T. Myers

Attachment D

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

November 7, 1984

BA4

The Honorable Richard L. Ottinger, Chairman
Subcommittee on Energy Conservation and Power
Committee on Energy and Commerce
United States House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

For your information, enclosed is a copy of the NRC's FY 1985 Initial Base Table.

Sincerely,

Carlton Kammerer, Director
Office of Congressional Affairs

Enclosure:
As stated

cc: Rep. Carlos Moorhead

IDENTICAL LETTER SENT TO:
Sen. Simpson/cc: Sen. Hart
Rep. Udall/cc: Rep. Lujan
[redacted]
Sen. Hatfield/cc: Sen. Johnston
Rep. Bevill/cc: Rep. Myers

OFFICE▶	OCA						
NAME▶	FAY:lac						
DATE▶	11/7/84						

U.S. Nuclear Regulatory Commission
FY 1985 Initial Base Table
(Dollars in Thousands)

	President's Budget	Adjustments[1/]	Congressional Reduction[2/]	Initial Base
Nuclear Reactor Regulation (NRR)	$ 90,950	+$1,001	-$ 700	$ 91,251
Inspection and Enforcement (IE)	92,190	+ 844	- 1,000	92,034
Nuclear Material Safety and Safeguards (NMSS)	43,520	- 884	- 1,000	41,636
Nuclear Regulatory Research (RES)	168,415	- 655	- 17,300	150,460
Program Technical Support (PTS)	30,545	+ 86		30,631
Program Direction and Administration (PDA)	42,580	- 392		42,188
Total	$468,200	-	-$20,000	$448,200

See attached page(s) for footnotes.

U.S. Nuclear Regulatory Commission
FY 1985 Initial Base Table
(Dollars in Thousands)

[1] Includes comparability transfer of $750,000 from the Office of the Secretary (SECY/PDA) to the Atomic Safety and Licensing Board Panel (ASLBP/PTS) for the Transcription Services Contract. ASLBP is using this contract in support of the ASLBP hearing process. In previous years, SECY funded this entire contract. Now SECY is only funding for effort in the Washington, D.C., area; and ASLBP is funding for effort outside the Washington, D.C., area.

Also includes adjustments for salaries and administrative support. At the time the budget is formulated, salaries and benefits are allocated to each program based on the most current actual average salary rates for the staff within the program. Portions of administrative support costs are assigned directly to the applicable program (i.e., ADP costs directly related to a specific program) with the remainder allocated to programs based on a rate per staff year. The following year, when the next year's budget is formulated, actual salary rates have changed and the estimates for the direct allocation of administrative support costs are more refined. Therefore, to make the "current year" column of the budget on a comparable basis with the "budget year," the rate change adjustments are made. In addition, minor staff changes which have taken place in the past year require a reallocation of salaries and benefits, administrative support, and travel. The FTE reallocations are related to increased support of reactor operator licensing activities, increased reactor inspection efforts, increases to improve implementation of quality assurance recommendations, reduced uranium mill renewals and amendments, reduced research effort consistent with the research funding reductions, and no increase in the number of investigators.

[2] NRC allocation of the $20,000,000 reduction to our appropriation for FY 1985. Most of the reduction was applied to the research program (RES). As we stated in our letter to Senator McClure on August 31, 1984:

> "We carefully reviewed how best to distribute this reduction as equitably as possible among Nuclear Reactor Regulation, Inspection and Enforcement, Nuclear Materials Safety and Safeguards, and Nuclear Regulatory Research. There were no easy options. About fifty percent of NRC's budget is non-discretionary -- Salaries/Benefits and Administrative Support are directly tied to the size of our staff and their corresponding logistical support -- and must be paid, the only remaining area from which the $20 million reduction could be taken was the $237.5 million in Program Support funds. Of this $237.5 million, $151 million represented research support work and the remaining $86 million was for the support of the day-to-day licensing and regulatory oversight of operating plants, safeguards, transportation safety, and review and appraisal of new plants. We felt we could not cut deeply into the $86 million operating support without seriously threatening our immediate safety oversight responsibilities. Since NRC must give priority, through its inspection and licensing programs, to assuring the continued safety of operating facilities and industrial and medical use of radioactive

> materials and because of the magnitude of the reduction, the Office of Nuclear Regulatory Research absorbed a larger reduction than a pro rata share. We were terribly troubled by the need to apply such a disproportionate share of this $20 million cut to the research program but given the circumstances we felt we had no other options."

The principal impacts of this reduction to the research program are: reduction of some of the materials aging studies; termination of certain plant instrumentation and control programs; cancel planned thermal-hydraulic research on steam generators; reduce the analytical code effort to a maintenance level; significant reduction in hydrogen research; defer certain high-level waste research; and perform no research to provide technical guidance to states related to low-level waste facilities. Sufficient funds have been provided to complete the Phase I fuel damage test program at the PBF facility. The remainder of the Congressional reduction was allocated to lower priority activities related to licensing amendments (NRR), inspection support (IE), and transportation safety and waste management (NMSS).

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON D C 20555

NOV 6 1984

MEMORANDUM FOR: Carlton C. Kammerer, Director
Office of Congressional Affairs

FROM: Edwin G. Triner, Director
Division of Budget and Analysis
Office of Resource Management

SUBJECT: FY 1985 BASE TABLE

Attached are sufficient copies of NRC's initial FY 1985 Base Table for you to distribute to the respective appropriation and authorization committees.

If you have any questions concerning the information contained in the table, please call Rich Shumway or Ray Sanetrik at 492-7988.

Ed Triner
Edwin G. Triner, Director
Division of Budget and Analysis
Office of Resource Management

Attachment:
As stated (10)

QUESTION 26. The NRC and the Department of Justice (DOJ) are developing a memorandum of understanding to provide for coordination of investigations between the two agencies.

(A) Describe what problems existed between the NRC and DOJ which led to the need for a memorandum of understanding.

ANSWER.

The decision to negotiate a Memorandum of Understanding (MOU) arose not so much out of specific problems as it did from the mutual recognition of the desirability of formalizing the procedures for the exchange of investigative information between the two agencies. Both agencies felt that an MOU provided for a greater degree of consistency and understanding in these areas. Moreover, the development of an MOU allowed both agencies to arrive at an agreement regarding such issues as the timing of investigative referrals and the mechanisms and criteria for either agency to defer actions until the other has taken its action.

When criminal wrongdoing in the nuclear industry occurs both the NRC and the DOJ are interested in prosecuting such action so as to deter possible future criminal wrongdoing. Normally, the DOJ prefers no action by NRC pending the prosecution of a criminal case. However, when the NRC concludes, based on the conduct which may involve criminal wrongdoing, that immediate action is necessary to protect the public health and safety, the NRC has a duty to take such action. DOJ recognizes NRC's over-riding health and safety responsibilities. A central purpose of the MOU is to clearly define the process for NRC and DOJ carrying out their different responsibilities harmoniously.

(B) Describe what priorities have been tentatively agreed to with respect to NRC referrals to DOJ.

ANSWER.

There has been no discussion of priorities, per se, with respect to NRC referrals to DOJ. The Director, OI, refers to DOJ those matters for which the OI investigation has produced sufficient evidence to support a reasonable suspicion that a criminal violation has occurred. Although this is normally done at the completion of the investigation, the Director, OI, may elect to advise DOJ prior to completion of the OI investigation. Such a decision may be made on a case by case basis to allow DOJ additional time to evaluate the matter. This may occur in highly visible cases, when prompt NRC action to protect public health and safety is necessary or when DOJ intervention may be necessary to prevent additional criminal activity or the destruction of evidence. The NRC does not have a formal prioritization system for its criminal referrals to DOJ.

QUESTION 27. In testifying before the Subcommittee on October 8, 1987, Mr. Hayes said he would favor legislation codifying OI authorities and responsibilities as long as certain "guarantees" were included. Describe more fully the "guarantees" envisioned.

ANSWER.

Mr. Hayes has provided the following explanation:

My remark about "guarantees" was in response to a question from Senator Simpson (hearing Transcript, at page 90, line 21) as to whether "providing a statutory underpinning for OI" would be a satisfactory solution.

My response was that it would be satisfactory were the legislation to "incorporate the guarantees of the Inspector General to the extent...that an IG Bill does...". This would include at least the authorities currently granted OI in the original 27 Commission-approved OI Policy Statements and other delegations of authority. A most important feature would be the establishment by statute of OI as a Commission-level office.

In addition to codification of its existing authorities and responsibilities, I was also referring to at least three important authorities given to Inspectors General, but currently not given to OI. These are: (1) the authority of the Director, OI, to appoint, direct, and supervise all subordinate OI personnel, (2) statutory authority to conduct criminal investigations, and (3) a separate appropriations account to assure OI independence.

QUESTION 27. (continued) - 2 -

My testimony was meant to reflect my belief that a statutory OI, reportable and accountable to the Commission as we were prior to February 1, 1988, that was granted authorities as described above, would be a satisfactory alternative to making OI a part of a statutory NRC Office of Inspector General. Without those authorities, I am no longer confident of OI's ability to continue to provide the quality and quantity of investigative support that it has provided this agency and the American public for the past five years.

QUESTION 29. Describe the reasons why the Commission issued a policy statement for training nuclear power plant personnel. Also, describe the reasons a policy statement was chosen instead of a rule in this area.

ANSWER.

Public Law 97-425, Section 306, directed the Commission to promulgate regulations or other regulatory guidance for the training and qualification of nuclear power plant personnel. After considering the various options available for regulating training and reviewing existing industry efforts, the Commission decided that a Policy Statement endorsing an ongoing INPO program which seeks to establish standards of excellence rather than meeting minimum NRC requirements would be the most efficient and effective mechanism for meeting the intent of the Public Law. The INPO program contained the elements of a systems approach to training which the NRC considered to be state-of-the-art and later embraced in rule changes to Part 50 and 55 published in the Federal Register (52 FR 9453). The INPO program is enforceable through regulations in Parts 50 and 55 for those utilities which adopt it. The use of the Policy Statement is conditional on the NRC's continued endorsement of INPO's program. The NRC will consider rulemaking in this area should a change in position occur with INPO.

1/27/88 BREAUX Q29

QUESTION 31. Has the Commission deferred rulemaking beyond the original two years? If so, for how long? What are the reasons for extending the deferral period?

ANSWER.

The Commission has approved deferring rulemaking on training and qualification of nuclear power plant personnel for an additional 2-year period by issuing a revised Policy Statement. The revised Policy Statement would continue to emphasize the elements of effective performance-based training and would provide for continued monitoring and evaluation of the INPO program. The response to Question 30 discusses the reason for this revision.

QUESTION 32. Do either of NRC's investigative organizations (OI and OIA) have any role in auditing or reviewing the INPO-managed training program? Has this option ever been formally considered by the Commission?

ANSWER.

The basic functions of OI and OIA would not routinely involve them in auditing or reviewing the INPO training accreditation program. As a result, neither OI nor OIA have had a role in auditing or reviewing the INPO-managed training program. To the best of our knowledge, the Commission has never formally considered such an option. OI might be involved in a review of a utility's program if there was a reason to believe that some wrongdoing by a licensee or its employees had occurred in the program.

QUESTION 35. The Commission has testified that the NRC monitors operator license exams and reviews those exams. What is the pass rate for utility-given requalification examinations for operator licensing?

ANSWER.

In the past, the NRC administered and monitored operator requalification examinations only on a sample basis. For this reason, the NRC does not have comprehensive records of the pass rate of requalification examinations given by utilities. Since normal utility practice is to remediate examination deficiencies and then reexamine the affected operator, we anticipate that the pass rate on utility-given requalification examinations would be high.

QUESTION 41. During his testimony before the Subcommittee, Mr. Stello said he favored a policy statement on maintenance rather than a rule, in part, because he did not want to "lose the momentum" by the industry in the maintenance area. Please describe the specific examples of industry initiatives contributing to this momentum.

ANSWER.

The industry has taken a number of steps in this area since 1985. Some of the most significant of these are:

1. Development of the document "Guidelines for the Conduct of Maintenance at Nuclear Power Stations" (INPO 85-038). This report provides a comprehensive overview for the development, implementation, and periodic reassessment of a facility's maintenance program.

2. Industry Maintenance Self-Assessment. In 1987, all licensees conducted a self-assessment of their maintenance programs using the INPO guidelines. The goal of the self-assessment process was to identify problem areas in clear and sufficient detail so root causes could be determined and corrective actions taken.

3. Formation of the INPO Maintenance Assistance and Review Teams. INPO formed two teams of maintenance experts to visit nuclear plants upon the request of the utility. Working closely with the plant and corporate personnel, the team focuses on determining the root causes of the more significant maintenance problems. Recommendations for improvement are provided to the utility in writing.

The industry has informed the Commission of its activities through periodic briefings (November 6, 1985; November 20, 1986; May 13, 1987). INPO provided a list of specific activities in a letter from W. F. Conway to J. W. Roe, NRC, dated September 10, 1987. A copy of the letter is attached. *

A majority of the Commission recently voted to direct the staff to go forward with rulemaking activities in this area. (See answer to question 44).

Attachment:
INPO Letter

*The letter and attachments have been retained in committee files.

QUESTION 42. If the nuclear utility industry has, in NRC's view, made good faith efforts in properly maintaining its plants, is it the NRC's responsibility, as the regulator, to have fully enforceable regulations pertaining to all maintenance areas of nuclear power plants?

ANSWER.

It is the responsibility of the NRC to ensure that all nuclear power plants are maintained and operated in a manner that ensures the health and safety of the public. The method for that assurance, be it regulation or some other means,is decided on a case-by-case basis. The NRC does not believe that regulations are necessary in all cases. Often, as exemplified in the training areas, a Policy Statement or some other alternative is preferable. As noted in the answers to items 41 and 44, the EDO has been directed to develop a proposed rule in this area.

QUESTION 43. Describe the industry role and participation in drafting the proposed policy statement on maintenance. In your discussion, include a list of all meetings between NRC staff and NUMARC/INPO members and the topic of discussion for each meeting.

ANSWER.

The proposed policy statement on maintenance was developed solely by the NRC staff. However, the decision to develop a policy statement and the general content of the statement were discussed at a meeting with INPO on July 8, 1987. A NUMARC representative also attended the meeting. At the meeting, the staff described the approach being used in the development of the policy statement, but specifics of the policy statement were not discussed. The staff did solicit information regarding what, if any, industry initiatives could be endorsed in the policy statement.

The staff has also met with NUMARC and INPO representatives to discuss technical areas of mutual interest in the area of maintenance. One such meeting was held July 16, 1985 at the EPRI Non-Destructive Test Center and another was held October 16, 1985 at the Crystal River nuclear plant. The first meeting involved an overview of EPRI research projects and a utility presentation on the application of those programs. The second meeting involved a presentation on the application of preventive and predictive maintenance programs. Additionally, the staff met with representatives of INPO and NUMARC on August 15, 1986 to present the findings of Phase I of the Maintenance and Surveillance Program Plan. The policy statement on maintenance was not discussed at any of these meetings.

1/27/88 BREAUX Q43

QUESTION 44. Summarize the status of NRC's maintenance policy statement. Also, give your best estimate of when the policy statement will come before the Commission for a vote.

ANSWER.

The NRC proposed Policy Statement on Maintenance was forwarded to the Commission by memorandum dated December 30, 1987 (SECY 87-314). The staff briefed the Commission regarding the content of the Policy Statement on January 7, 1987. The Commission has subsequently approved a modified final policy statement and directed the staff to develop a notice of proposed rulemaking for Commission review by August 1, 1988. A copy of the Staff Requirements Memorandum with its attachments is provided with this answer.

Attachment:
Memo to Victor Stello and Raymond Fraley
from Samuel Chilk dated 2/25/88

QUESTION 44 ATTACHMENT

IN RESPONSE, PLEASE
REFER TO: M880107

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555

OFFICE OF THE
SECRETARY

February 25, 1988

MEMORANDUM FOR: Victor Stello, Jr., Executive Director for Operations

Raymond F. Fraley, Executive Director for ACRS

FROM: Samuel J. Chilk, Secretary

SUBJECT: STAFF REQUIREMENTS -- SECY-87-314 - INTERIM POLICY STATEMENT ON MAINTENANCE OF NUCLEAR POWER PLANTS AND REQUIREMENTS FROM STATUS BRIEFING ON JANUARY 7, 1988 (COMMISSIONERS' CONFERENCE ROOM, DC OFFICE, OPEN TO PUBLIC ATTENDANCE)

In public session on January 7, 1988, the Commission was briefed by the staff on its proposed "Interim Policy Statement on Maintenance of Nuclear Power Plants" as contained in SECY-87-314. This is a joint SRM which contains a summary of views and comments of the Commission expressed at that meeting and those contained in their vote sheets on SECY-87-314 which were submitted after the briefing. (Their full views were provided to you with their vote sheets.)

1. The Commission, with Chairman Zech and Commissioners Carr and Rogers concurring, has approved the attached Policy Statement, as modified by Commissioners Carr and Rogers, for publication as a final statement in the Federal Register.
   (EDO) (SECY SUSPENSE: 3/14/88)

2. The Commission, with Chairman Zech and Commissioners Carr and Rogers concurring, directs the staff to develop a notice of proposed rulemaking for Commission review no later than August 1, 1988. The proposed rule should spell out NRC's expectations in maintenance within the framework of the attached final policy statement, yet still encourage industry initiatives to achieve excellence. In preparing the proposed rule, the staff should consult in some open fashion with interested persons, including representatives of the regulated industry, and should consider maintenance approaches in other countries. Staff should also review practices in other industries in this country in which human performance and equipment reliability play an important role in safe operations, and regulatory activities which ensure the adequacy of these practices. The staff should periodically brief the ACRS and seek their input during the development of the notice of proposed rulemaking. In this regard, the Chairman suggested that the staff should also schedule public workshops to solicit early public and regulated industry participation in the formulation of the proposed rule, and that the ACRS should consider monitoring one or more of these workshops as a part of their review activities.
   (EDO/ACRS) (SECY SUSPENSE: 8/1/88)

Chairman Zech noted that SECY-87-314 represented an outstanding effort by the staff to carry out the Commission's previous guidance in the development of NRC's maintenance policy. He commended the staff for their vigorous approach to this important issue which can contribute to improve safety of operations. Chairman Zech and Commissioner Bernthal suggest that the staff should proceed with plans to implement professional maintenance inspections using highly qualified specialists, including perhaps peer reviewers from outside the agency; the staff should focus on developing the criteria needed to implement a final maintenance rule by inspecting maintenance practices at both good and poor performing plants; the staff should also continue to follow the development of industry consensus on the standards for maintenance.

Commissioners Roberts and Bernthal believe that the approach the Commission takes in the area of maintenance in order to assure protection of public health and safety is a major policy question. As such, the Commission should have the benefit of the views of both the public and industry (not to mention the ACRS). Therefore, they approve in principle the staff's recommendation in SECY-87-314. However, they believe that the ACRS's views should be considered by staff prior to any policy statement being published (especially in light of its February 16, 1988 letter). They do not approve making the current draft of this policy statement final at this time. In addition to not providing for a formal public comment period on a major Commission policy, it does not include two important aspects of the staff's proposal. First, it does not provide the focus on those systems which are important to the safe operation of nuclear power plants. Second, instead of encouraging industry initiatives toward self-improvement as the staff's proposal does, the current draft will most likely discourage further industry initiatives as utilities will await NRC rulemaking, thereby delaying continuing improvement in this area.

Commissioner Bernthal has the following further comments, which Commissioner Roberts supports:

> The Commission first voted to produce a maintenance policy statement on April 27, 1987 via SECY-86-316. Only Commissioner Asselstine dissented, recommending that the Commission instead develop a rule. On September 11, 1987 Chairman Zech in COMLZ-87-51 proposed that "staff should proceed with an Advance Notice of Proposed Rulemaking and studies necessary to develop a proposed maintenance rule...", a directive to which I raised no objection, but I urged that these matters not be permitted to delay Commission consideration of Staff's final draft policy statement, then scheduled for October.
>
> Five months later, the policy statement still has not issued, but the Commission majority has apparently reached a final decision to proceed with a maintenance rule. Unfortunately, this issue has had little or no discussion by the Commission, by the Staff (understandably, since the Commission directed otherwise in SECY-86-316), and certainly has not had the benefit of public or ACRS comment. Indeed, I am informed that ACRS remains unconvinced of the appropriateness of a rule, and even raises serious concerns about the proposed policy statement (cf. February 16 memorandum from ACRS Chairman Kerr to Chairman Zech). In the Commission's January 7, 1988 briefing, the EDO indicated Staff's own uncertainty as to the content of any such rule.

In view of all these factors, I believe it no longer makes sense for the Commission to issue a policy statement, interim or otherwise. At this late stage, especially if the Commission wishes to proceed with a rule as early as August, industry is likely to note little and remember less any Commission policy statement -- they will simply await the proposed rule.

There is, however, an appropriate procedural mechanism for circumstances such as this, when 1) it is not entirely certain (at least on the part of ACRS) that a rule is appropriate, and 2) if a rule is deemed necessary, there is great uncertainty as to what form the rule should take. The appropriate procedure is an Advance Notice of Proposed Rulemaking, as first suggested by the Chairman last September. Moreover, Staff's commendable efforts to provide a more detailed description of maintenance programs and components, systems and structures -- elements which could have formed the core of an ANPR if not of the rule itself -- would not have been lost in the interim, but could immediately have been offered for public and ACRS comment.

In sum, I would have directed Staff to develop forthwith an Advance Notice of Proposed Rulemaking, for publication as soon as possible. Staff's draft policy statement should have formed the basis for the ANPR. (Alternatively, the policy statement drafted by Commissioners Carr and Rogers could also have served as the basis, while those Staff sections deleted in the C&R version could be presented separately for public comment). The current state of this SRM and the many major policy issues raised therein are reason enough to choose the ANPR as an alternative course, fully consistent with the latest intent of the Commission. This course would not have delayed ultimate issuance of a maintenance rule should the Commission finally so choose. Indeed, in all likelihood it would have expedited such issuance.

On additional matters related to maintenance of nuclear power plants, the following guidance are offered for staff action:

a. The Commission, with all Commissioners concurring, requests the staff to investigate the pros and cons of continuing to require the surveillance and testing of equipment while the plant is at power. The staff should assure that NRC does not require unnecessary tests or inspections that result in equipment disassembly or unnecessary wear. Staff should inform the Commission of the bases of present requirements and any proposed modifications to present technical specification requirements.
   (EDO) (SECY SUSPENSE: 8/1/88)

b. The Commission, with Commissioners Roberts, Bernthal, Carr and Rogers concurring, questions whether a dedicated maintenance inspection program encompassing of 75 percent of the utilities is an effective use of limited resources. Instead, staff should continue its normal practice of assigning inspection resources to those plants needing more attention in the maintenance area, and should, in addition, conduct other visits, as necessary, to enhance the effectiveness of maintenance.

c. The Commission, with Chairman Zech and Commissioners Carr and Rogers concurring, is concerned about the utilization of LER cause codes as a maintenance performance indicator due to the subjective nature of these codes; staff should continue efforts to develop maintenance indicators that are more quantifiable and meaningful. In this connection attention is invited to Commissioner Rogers' memorandum of January 21, 1988 to the EDO.
(EDO) (SECY SUSPENSE: 8/1/88)

d. The Commission's five-year plan should be adjusted in accordance with the above directives.
(EDO) (SECY SUSPENSE: 6/88)

In SECY-87-314, the staff indicates that "inadequate maintenance at some plants (emphasis added) has been a significant contributor to plant reliability problems and, hence, is of safety concern". Commissioner Roberts believes that in the near term the staff should focus its efforts on these plants to ensure corrective action is taken. In the long term, in a more deliberative manner and with full benefit of input from the public, ACRS and industry, he believes that staff should consider approaches to enhance the effectiveness of maintenance for all plants.

Commissioner Bernthal would also direct staff to assess the Japanese and other successful foreign maintenance programs and experience to determine, for example, whether a minimum required period of plant shut-down is key to an effective plant maintenance program.

Attachment:
As Stated

Copies:
Chairman Zech
Commissioner Roberts
Commissioner Bernthal
Commissioner Carr
Commissioner Rogers
OGC
ACRS
PDR

POLICY

Background

The Commission has a program to continually evaluate the operational performance of nuclear power plants. Analysis of operational events has shown that, in some cases, nuclear power plant equipment is not being maintained at a level which ensures, with a high degree of reliability, that the equipment will perform its intended function when required. A limited NRC examination of nuclear power plant maintenance programs has found a wide variation in the effectiveness of these programs. Inadequate maintenance at some plants has been a significant contributor to plant reliability problems and, hence, is of safety concern. The Commission believes safety can be enhanced by improving the effectiveness of maintenance programs throughout the nuclear industry. The Commission is proceeding with rulemaking consistent with this belief. This policy statement is being issued to provide guidance to the industry while the rulemaking proceeds.

Policy Statement

It is the objective of the Commission that all components, systems and structures of nuclear power plants be maintained so that plant equipment will perform its intended function when required. To accomplish this objective, each licensee should develop and implement a maintenance program which provides for the periodic evaluation, and prompt repair of plant components, systems, and structures to ensure their availability.

Definition of Maintenance

The Commission defines maintenance as the aggregate of those functions required to preserve or restore safety, reliability, and availability of plant structures, systems, and components. Maintenance includes not only activities traditionally associated with identifying and correcting actual or potential degraded conditions, i.e., repair, surveillance, diagnostic examinations, and preventive measures; but extends to all supporting functions for the conduct of these activities. These activities and functions are listed below under "Activities Which Form the Basis of a Maintenance Program".

Maintenance Programs

Each commercial nuclear power plant should develop and implement a well-defined and effective program to assure that maintenance activities are conducted to preserve or restore the availability, performance and reliability of plant structures, systems, and components. The program should clearly define the components and activities included, as well as the management systems used to control those activities. Further, the program should include feedback of specific results to ensure corrective actions, provisions for overall program evaluation, and the identification of possible component or system design problems.

Activities Which Form the Basis of a Maintenance Program

An adequate program should consider:

- Technology in the areas of
  - corrective maintenance,
  - preventive maintenance,
  - predictive maintenance,
  - surveillance;
- Engineering support and plant modifications;
- Quality assurance and quality control;
- Equipment history and trending;
- Maintenance records;
- Management of parts, tools, and facilities;
- Procedures;
- Post-maintenance testing and return-to-service activities;
- Measures of overall program effectiveness.

- Maintenance management and organization in the areas of
    - planning,
    - scheduling,
    - staffing,
    - shift coverage,
    - resource allocation;
- Control of contracted maintenance services;
- Radiological exposure control (ALARA);
- Personnel qualification and training;
- Internal communications between the maintenance organization and plant operations and support groups;
- Communications between plant and corporate management and the maintenance organization.

Maintenance recommendations or requirements of individual vendors should receive appropriate attention in the development of the maintenance program.

Future Commission Action

The Commission intends this policy statement to provide guidance to the industry in improving maintenance programs for their power reactor facilities. The Commission will continue to enforce existing requirements including those that address maintenance practices and will take whatever action that may be necessary to protect health and safety.

The Commission expects to publish a Notice of Proposed Rulemaking in the near future that will establish basic requirements for plant maintenance programs. We believe that the contents and bounds of the proposed rule will fall within the general framework described in this policy statement. Consideration will also be given to industry-wide efforts that already have been initiated. We encourage interested parties to provide their views on this important subject to the Commission, even at this early stage of the rulemaking process. Any notice of proposed rulemaking that is published will provide, of course, a period for public comment on its contents.

QUESTION 45. In his testimony before the Subcommittee, an INPO representative described in the document "Guidelines for the Conduct of Maintenance at Nuclear Power Stations" as the foundation for industry self-assessment efforts.

(A) As the regulator of the nuclear power industry, did the NRC have any role in developing INPO's maintenance guidelines?

ANSWER.

NRC did not have a role in developing INPO's maintenance guidelines; however, NRC did provide inspection checklists to INPO, several years ago, that included a checklist for the maintenance area. The staff does not know the extent to which INPO considered that information in developing these guidelines.

QUESTION 45. (continued) - 2 -

(B) Does the NRC have any formal role in reviewing or updating INPO's maintenance guidelines?

ANSWER.

NRC has no role in reviewing or updating INPO's maintenance guidelines.

1/27/88 BREAUX Q45

QUESTION 45. (continued) - 3 -

(C) Describe NRC-mandated requirements INPO must follow in reporting utility compliance with the maintenance guidelines.

ANSWER.

There are no NRC-mandated guidelines INPO must follow regarding reporting utility compliance with INPO's maintenance guidelines.

QUESTION 45. (continued) - 4 -

(D) Describe INPO's range of enforcement options to ensure utilities comply with its maintenance guidelines.

ANSWER.

INPO has no authority to fine or shutdown utilities, but INPO has a variety of enforcement options which can be used based on the magnitude of the problem encountered. Examples range from "findings" for improvement contained in the initial and final plant assessment reports, private communications at the mid-management level which include letters, meetings, and one-on-one conversations, to the President of INPO generating correspondence and having conversations with CEOs. The consequences of not responding to INPO findings can lead to negative effects in areas of insurability, financial security, and public opinion, as recently demonstrated in the case of the Philadelphia Electric Company at Peach Bottom.

1/27/88 BREAUX Q45

QUESTION 45. (continued)

(E) To the NRC's knowledge, has INPO ever taken enforcement action because of violations of its maintenance guidelines? If so, fully describe the circumstances.

ANSWER.

The NRC is typically not made aware of enforcement actions taken by INPO if it is resolved with the utility and knows of no actions due to violations of the INPO maintenance guidelines.

QUESTION 46. During the course of the hearing on October 20, 1987, the Commission stated that it would look again at the wording of its policy statement on enforcement with regard to the Commission's reopening an enforcement action if it appears the penalty assessed against a licensee should be increased. The Chairman also agreed to let the Committee know what is going to be done as a result of the second look, what has been done, and what is going to be done regarding this issue?

ANSWER.

The Commission has completed action on a revision to the enforcement policy which clarifies that the NRC would consider the merits of reopening a closed case for the purpose of either increasing or of decreasing the enforcement sanction. A copy of our February 24, 1988 letter on this matter is attached.

QUESTION 46 Attachment

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20[illegible]

CHAIRMAN

February 24, 1988

The Honorable John B. Breaux, Chairman
Subcommittee on Nuclear Regulation
Committee on Environment and Public Works
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

During the course of the hearing on October 20, 1987, you raised an issue concerning how the NRC considers reopening closed enforcement actions under our enforcement policy. Your particular concern was that it appeared to you that enforcement actions would be reopened to decrease penalties, but would not be reopened to increase penalties as a result of new information. At that hearing I committed to you that the Commission would review that aspect of the enforcement policy.

I am pleased to inform you that the Commission completed action today on a revision to the enforcement policy which clarifies that the NRC would consider the merits of reopening a closed case for the purposes of both increasing and decreasing the enforcement sanction. This clarification should remove any doubt as to the Commission's intention to respond appropriately when new information, which has implications for previously closed enforcement actions, comes to the Commission's attention. The staff will be preparing a Federal Register Notice with the clarifications to the enforcement policy. I believe the Commission's action fully addresses the concerns you expressed in the October 20, 1987 hearing.

Sincerely,

Lando Zech

Lando W. Zech, Jr.

cc: Senator Alan K. Simpson

CHAIRMAN

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

March 2, 1988

The Honorable John Breaux, Chairman
Subcommittee on Nuclear Regulation
Committee on Environment and Public Works
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I am enclosing answers to the questions contained in your January 27, 1988 letter as follows:

15(E), 75, and 76 (note that 73 has been merged with 75).

As discussed with Mr. Tim Smith of your staff, the remaining answers concerning the Office of Inspector and Auditor will be forwarded next week.

Sincerely,

Lando W. Zech Jr.

Lando W. Zech, Jr.

Enclosures:
As stated

cc: Sen. Alan K. Simpson

(E) the total number of cases OI and OIA collaborated on.

ANSWER.

If "collaboration" means instances where both OIA and OI jointly work the same investigation or portions thereof, such as the conduct of joint interviews, there is no record of any such OIA/OI collaboration.

OI and OIA have shared information and mutually coordinated with each other on approximately 6 investigative cases since 1984.

QUESTION 75. With regard to the proposed amendment to the Commission's regulations concerning the obligations of licensees and applicants for licensees to provide the Commission with complete and accurate information--

Subpart (b) requires licensees and applicants to provide the Commission with "information identified by the applicant or licensee as having for the regulated activity a significant implication for public health and safety or common defense and security." Thus, under this proposal, the determination of what information is significant, and therefore reportable, is up to the licensee--not the Commission. An objective test is not used.

(A) Is this reading of subpart (b) correct? If not, please explain.

ANSWER.

This reading of subpart (b) is correct, in that the standard is one of licensees' own recognition of information with significant health or safety, or common defense or security implications. This does not mean, however, that a licensee can evade the rule by never "finding" information to be significant. The fact that a licensee considers information to be significant can be established, for example, by actions taken by the licensee to evaluate that information. Thus, even though the rule contains a subjective test in requiring reporting of information a licensee recognizes as significant, there

Question 75. (continued) -2-

are objective indicia of recognition that can be used by the NRC in determining whether a licensee in fact recognizes the significance of the information in question.

This subpart applies to a small set of possible reportable items (only those that are not required by existing rule, order, statute, license condition, etc.). This element of the rule is intended to be a residual reporting requirement to cover items not otherwise required to be reported and for which the NRC has established no reporting standard.

Question 75. (continued) -3-

(B) Did the Department of Justice comment on this aspect of the proposed amendment? If so, what was its comment?

ANSWER:

The Department of Justice, in a letter dated December 18, 1986, from Victoria Toensing to William C. Parler, proposed an objective standard for the reporting of information. The Department proposed that the standard should be whether information is "reasonably identifiable." Otherwise, in the Department's opinion, the licensee would have an incentive not to identify information as significant in order to avoid possible criminal prosecution.

Nevertheless, as stated above, there are objective indicia which can be used in determining whether a licensee, in fact, recognizes information to be significant.

1/27/88 BREAUX Q75

(C) Do you believe that the best policy is that the determination of what is "significant information" should be made by licensees and applicants rather by the NRC under an "objective test"? If so, why?

ANSWER.

The Commission believes that the standard it has adopted is the better one as a matter of policy. To begin with, the standard is sufficiently clear that licensees will be able to determine when reporting is required; that is, when the licensee itself identifies information with significant health or safety, or common defense or security implications. This is a standard that the Commission should reasonably expect licensees to understand and apply.

The rule, as drafted, offers more guidance to a licensee than a formulation which would require a licensee to try to predict what someone else believes is reasonable and is sufficiently specific to discourage attempts to evade the rule. Moreover, abuse of a licensee's responsibility under paragraph (b) could be addressed by the Commission under its authority to issue orders to modify, suspend, or revoke a license. For example, an order would be appropriate where the action of a licensee in not recognizing the significance of the information and failing to report it, together with other relevant facts, raises serious questions about either its trustworthiness or its competence.

QUESTION 76. During the hearing on October 20, 1987, certain alleged contacts, by Commissioners with members of a law office in which the merits of a staff draft of a proposed rule on material false statements, SECY 85-149, were discussed. Copies of a letter describing those alleged contacts, dated July 16, 1985, and signed by a local attorney, have been provided to the Commission. With regard to the representations made in that letter and the handling of a Freedom of Information Act request pertaining to SECY 85-149, please answer the following questions:

(A) The Law firm letter states, "On May 7 and 8, we learned that Chairman Palladino voted for all three components of the proposed Rule, that Commissioner Zech voted for the first and third components of the proposed rule, that Commissioner Bernthal was believed to be the key vote, and that Commissioners votes were due by May 10." Had Chairman Palladino and Commissioner Zech cast such votes by May 7 and 8? Had Commissioner Bernthal voted by then?

ANSWER.

Chairman Palladino and Commissioner Zech both signed vote sheets on SECY-85-149 on May 2, 1985. Commissioner Bernthal signed his vote sheet on

QUESTION 76. (continued) - 2 -

May 9, 1985. Chairman Palladino's vote sheet approved the staff SECY paper with specific comments on paragraph a (approved), paragraph b (approved OGC's version), and paragraph c (approved with modifications). Commissioner Zech's vote sheet approved the staff SECY paper with specific comments on paragraph b (approved the staff's proposal) and paragraph c (approved).

QUESTION 76. (continued) - 3 -

(B) Do any of the Commissioners have any knowledge regarding how this law firm was able to learn the individual Commissioner's intentions with such specificity?

ANSWER.

Chairman Zech and Commissioner Roberts have no knowledge regarding how the law firm was able to learn of their specific individual voting intentions. See the comments of Commissioner Bernthal below. Commissioners Carr and Rogers were not members of the Commission at the time.

1/27/88 BREAUX Q76

(C) The letter then states, "Accordingly, Don Knuth of KMC and Jessica [Laverty] meet with Commissioner Bernthal on or about May 9."

Did Don Knuth and Jessica Laverty meet with Commissioner Bernthal on or about May 9 to discuss his vote on the proposed material false statement rule? If they did meet with Commissioner Bernthal, did they urge the Commissioner to vote to delay issuance of any proposed rule on material false statements until after the Commission has received the recommendations of its Advisory Group on Enforcement Policy?

(D) Did Commissioner Bernthal vote to delay issuance of the proposed rule pending receipt of the Advisory Group's recommendations? If he did so, did he do so as a result of his meeting with Attorneys Knuth and Laverty?

(E) 1. Are there any documents which indicate Commissioner Bernthal's position on the proposed rule prior to his meeting with Laverty and Knuth? If so would you please provide them for the record. The attorney's letter further states, "Prior to the May 1 due date for Commissioner votes, Jessica also spoke to

> the legal assistants to Commissioner Roberts and Commissioner Zech concerning the problems with the proposed rule on material false statements."

ANSWER.

Commissioner Bernthal's responses are contained in a February 25, 1988 memorandum to John Bradburne which is attached to Question 76(F).

(E) Did Ms. Laverty speak to Commissioner Roberts and Chairman Zech's legal assistants as represented in the attorney's letter? If so, were the Commissioner's votes influenced as a result of those meetings?

ANSWER.

Although not able to say with absolute certainty whether Ms. Laverty did or did not speak to him about the proposed rule on material false statements, Commissioner Roberts' legal assistant does not recall any such conversation. Moreover, it is highly unlikely that Commissioner Roberts' vote would have been influenced had any such conversation taken place. His views on material false statement matters have been clearly stated and virtually unchanged since he assumed office as an NRC Commissioner. (Ms. Laverty was Commissioner Roberts' first legal assistant and served in that capacity from August 1981 until mid-September 1983 when Mr. Cutchin succeeded her.)

Commissioner Zech's legal assistant does not have any recollection of Ms. Laverty speaking to him on this subject and does not believe that he had such a conversation. In any event, he is certain that, even if any such conversation had taken place, he would have not discussed it with the Commissioner in connection with his vote on the issue or for any other purpose.

(F) Did Commissioner Bernthal meet with anyone else concerning how he should vote on the issuance of a proposed rule on material false statements? If so, who and when did he meet?

ANSWER.

Commissioner Bernthal's response is contained in the attached February 25, 1988 memorandum to John Bradburne.

Attachment:
2/25/88 Memorandum from
Commissioner Bernthal to John Bradburne

QUESTION 76(C-E.1 & F)
Attachment

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555

OFFICE OF THE
COMMISSIONER

February 25, 1988

MEMORANDUM FOR: John Bradburne, OCA

FROM: Frederick M. Bernthal

SUBJECT: Response to Selected Prehearing Questions per Breaux/Simpson letter of 27 January 1988

Certain questions on the above-captioned subject refer to my May 1985 role in the Commission's decision-making process on the Material False Statement Rule. Please incorporate the following responses in your submittal:

Question VIII.3.a (pp. 17-18)

Answer: No.

Question VIII.3.b

Answer: I have no such knowledge.

Question VIII.3.c

Answer: My personal schedule indicates that they did. I have no recollection or documentation of the views Mr. Knuth and Ms. Laverty may have conveyed. Mr. Steve Sohinki, my legal assistant at that time, does not even recall the meeting.

Question VIII.3.d:

Answer: Yes (see attached vote sheet). Their claimed urgings were absolutely immaterial to my vote. Indeed, my then legal assistant, Mr. Sohinki, recalls having recommended to me before the date of my vote that the Commission, having constituted the Advisory Group on Enforcement Policy to study this subject, would be ill-advised not to await the decision of that group before finalizing action on the matter (see attached vote sheet). I concurred in that view. Though we are unable to verify it, my May 9 (not May 10, as indicated in the Wetterhahn letter) vote on this issue may actually have been submitted before the referenced meeting.

Question VIII.3.e.

Answer: I have not discovered any such documents, and to the best of my knowledge there are no such documents. But note the recollections indicated above.

Question VIII.3.f

Answer: It has long been my policy to have an open door to any member of the public who wishes to discuss the public business of the Commission, subject of course to the constraints of the Administrative Procedures Act. I consider that a duty of a Member of the Commission. On this particular issue, the referenced meeting is the only one I or my staff can document or recollect, except of course for meetings with the Advisory Group on Enforcement Policy.

NOTATION VOTE

RESPONSE SHEET

TO: SAMUEL J. CHILK, SECRETARY OF THE COMMISSION

FROM: COMMISSIONER BERNTHAL

SUBJECT: SECY-85-149 - MATERIAL FALSE STATEMENTS

APPROVED______ DISAPPROVED ✓ ABSTAIN______

NOT PARTICIPATING______ REQUEST DISCUSSION ✓

COMMENTS:

After giving this matter considerable thought, I believe that the Commission should not publish a proposed rule at this time. Instead, the Commission would be well advised to await the report of its Advisory Committee on Enforcement Policy, which is expected in approximately three months. Since this Committee of distinguished individuals was specifically requested to look into the area of material false statements, it seems to me that courtesy, if nothing else, dictates that no Commission proposal be approved prior to receipt of the Committee's input.

SIGNATURE

5/9/85
DATE

SECRETARIAT NOTE: PLEASE ALSO RESPOND TO AND/OR COMMENT ON OGC/OPE MEMORANDUM IF ONE HAS BEEN ISSUED ON THIS PAPER.

NRC-SECY FORM DEC. 80

(G) During the October 20, 1987, hearing the Commission's handling of a Freedom of Information Act (FOIA) Request for SECY 85-149 and related documents was discussed.

Please indicate if any FOIA requests were made to the NRC regarding SECY 85-149. If so, please specify all requests and all dispositions of those requests.

ANSWER

NRC has identified two Freedom of Information Requests for which SECY 85-149 was found to be within the scope of the requests. They are as follows:

1. A request dated June 7, 1985, from Margaret L. Ryan for "all notation votes made by the Commission in the months of January, February, March, April and May 1985." In a response dated February 27, 1986, the NRC erroneously denied access to SECY-85-149 pursuant to Exemption 5 (See response to Question 76(H)). (FOIA-85-409)

2. A request dated August 28, 1987, from Robert M. Rader for "all documents relating to the proposed rule entitled 'Completeness and Accuracy of Information,' published at 52 Fed. Reg. 7432 (March 11, 1987)." In a response dated January 22, 1988, the NRC informed the requester that the record SECY-85-149 was already publicly available in the NRC's Public Document Room. In a previous response dated January 11, 1988, the NRC denied access to a draft version of SECY-85-149. (FOIA-87-570)

(H) Did the individual Commissioners vote to withhold SECY 85-149 on appeal? If so, why? Why would a Commissioner vote to withhold a document as predecisional if he or his staff had discussed the contents of the document with private parties and in an open meeting?

ANSWER

There was no FOIA appeal to the Commission regarding the withholding of SECY-85-149. There was, however, an appeal for the previously withheld notation vote sheets. The disposition of that appeal was described in Chairman Zech's letter of December 23, 1987, a copy of which is attached.

Attachment:
12/23/87 Letter to Sen. Breaux
from Chairman Zech

QUESTION 76(H) Attachment

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

CHAIRMAN

December 23, 1987

The Honorable John B. Breaux, Chairman
Subcommittee on Nuclear Regulation
Committee on Environment and Public Works
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

During the Commission's appearance before your Subcommittee on October 29, 1987, I committed to report to the Subcommittee on the circumstances surrounding the disposition of an FOIA request filed by Inside NRC on June 7, 1985.

Our General Counsel has looked into this matter and has concluded that an inadvertent error was made while processing this particular FOIA request. A copy of his report on this matter is enclosed. However, I reiterate that, as I stated at the hearing, the Commission does not routinely make predecisional material, such as its vote sheets, public.

On May 3, 1985, a transcript of a May 2, 1985 Commission meeting and a copy of SECY-85-149 were placed in the Public Document Room (PDR). The Commission's Correspondence and Records Branch is customarily notified when Commission documents go into the PDR. In this particular case either the notification was overlooked or misplaced. Had that Branch received such notification, it would have logged SECY-85-149 as a public document. Inside NRC, at that point, would have and should have been notified of this fact and been given the accession number of the document for retrieval purposes. A document search reveals that an employee in the Office of the Secretary, a Commission level office, sent a memorandum to the Division of Rules and Records advising that the Commission had determined that SECY-85-149 was to be withheld pursuant to Exemption 5 of the FOIA. However, the usual documentation that would indicate that the Commission had in fact been consulted has not been located. Thus, as the General Counsel notes, the most that can be said is that "it was determined at the Commission level that SECY-85-149 was withholdable...."

However, the requested vote sheets had not been made public and would not have been released except by the election of each individual Commissioner. One Commissioner did so elect in this case. I cannot assume that Mr. Mark Wetterhahn had access to these vote sheets in order to make the statements in his July 16, 1985 letter that you read during the hearing. There were no ex parte considerations that would preclude discussion of this proposed rule. Thus, Mr. Wetterhahn could have reached conclusions in his statements by using information gathered from informal conversations, speeches, transcripts of meetings, and other communications.

The Commission does not believe that the circumstances surrounding the handling of this isolated FOIA request means that our FOIA procedures are generally flawed. I assure you and the other members of the Subcommittee that we make every effort to be fair in complying with FOIA requirements.

Sincerely,

Lando W. Zech Jr.

Lando W. Zech, Jr.

cc: Senator Alan K. Simpson

Attachment:
As stated

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

October 28, 1987

MEMORANDUM FOR: Chairman Zech

FROM: William C. Parler William C Parler
General Counsel

SUBJECT: DENIAL OF A FOIA REQUEST FOR A RECORD ALREADY MADE PUBLICLY AVAILABLE

Background

On October 20, 1987 at a hearing of the Subcommittee on Nuclear Regulation, an incident was discussed concerning the agency's processing of a FOIA request submitted by Inside NRC. Apparently, the agency denied Inside NRC's request for a record, SECY-85-149, which had already been released to the Public Document Room ("PDR"). I asked an OGC attorney to look into this matter with the following results:

> SECY-85-149 (Subject: Staff's Proposed Rule on Material False Statements) was submitted to the Commission on April 26, 1985. Discussion on the paper was scheduled for May 2, 1985 at an open Commission meeting. Prior to the May 2 meeting, a Commission monitor assigned to the Secretary's office was advised by the Office of the Executive Legal Director to make SECY-85-149 available to members of the public who would be attending the meeting. The monitor accomplished this by placing copies of the paper on a table in the back of the room where the meeting was to be held.
>
> On May 3, 1985, a transcript of the May 2 meeting and copies of SECY-85-149 were delivered to the PDR, and on May 15, 1985, these documents were catalogued and otherwise made available for release to any requesting member of the public. SECY papers are catalogued by number. Consequently, Mr. Wetterhahn (CONNER & WETTERHAHN) or any other member of the public could have obtained a copy of the SECY paper from the PDR by

Contact:
Carolyn F. Evans, OGC
x41493

simply requesting "SECY-85-149," assuming it was not obtained at the Commission meeting.

On June 7, 1985, Margaret L. Ryan, Chief Editor, Inside NRC submitted a FOIA request for "all notation votes made by the Commission in the months of January, February, March, April, and May 1985." In instances where the vote was to approve any documents not attached to the vote sheets such as SECY papers, Ms. Ryan requested release of these documents as well. In this way, SECY-85-149 was captured by Ms. Ryan's FOIA request which was subsequently assigned the sequential FOIA number 85-409 by the Division of Rules and Records.

Ms. Ryan's FOIA request was processed in the customary manner. Copies of her request were forwarded to all offices reasonably expected to have responsive records. Forty-six documents in all (including SECY-85-149) were identified as responsive to Ms. Ryan's request. These documents were then reviewed for the purpose of making a release/withhold determination under the FOIA. The review process was two tiered. First, the offices which authored the documents reviewed them and made an initial release/withhold recommendation. The documents were then reviewed at the Commission level. With respect to SECY-85-149, the Office of the Executive Legal Director made an initial "release" recommendation. This recommendation was not followed. Instead it was determined at the Commission level that SECY-85-149 was withholdable under Exemption 5 of the FOIA and it was denied on that basis.

Discussion

Inadvertent error can be isolated as the cause of the agency's "faulty" processing of Inside NRC's FOIA request. When the transcript of the May 2, 1985 meeting and copies of SECY-85-149 were delivered to the PDR, someone apparently forgot to advise the Chief of the Commission's Correspondence & Records Branch of the transmittal. Had he been so advised, he would have listed SECY-85-149 in his log as a publicly available record. Thus, when SECY-85-149 was identified as a responsive document, his log would have shown that the document was already in the PDR, Inside NRC would have been advised of this fact and given the accesssion number of the document for retrieval purposes, and the document would never have been reviewed for release/withhold determination. The error could have also been avoided if the Division of Rules and Records had accessed the Document Control System ("DCS") to see if any of the SECY papers identified as responsive to Inside NRC's request had been previously released to the public. The system would have indicated that SECY-85-149 was a publicly available document.

cc: Commissioner Roberts
Commissioner Bernthal
Commissioner Carr
Commissioner Rogers
EDO
SECY

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

CHAIRMAN

March 14, 1988

The Honorable John Breaux, Chairman
Subcommittee on Nuclear Regulation
Committee on Environment and Public Works
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I am enclosing responses to questions contained in your January 27, 1988 letter as follows:

47, 49, 50, 52, 53, 55, 59, 60, 63, 64, 65, 70, and 71.

These complete the responses to your questions with the exception of questions 58 and 72. Mr David C. Williams is conducting a special inquiry into these two matters. We will provide responses after we have the opportunity to review his findings.

Significant portions of the enclosed answers have not been made public. I ask that you help protect the confidentiality of this material by restricting its use to the subcommittee and its staff. Should you have any questions concerning a particular answer, our Congressional Affairs staff will be pleased to assist you.

Sincerely,

Lando W. Zech Jr.

Lando W. Zech, Jr.

Enclosure: As stated

cc: Sen. Alan Simpson

QUESTION 47. Page 2 of the NRC Chairman's statement dated October 8, 1987 before the Subcommittee indicated that the Commission occasionally directs OIA to give high priority to matters which affect the Commission's safety decisions. Can you give us some examples of such matters? How did OIA respond to the Commission's directions?

ANSWER.

Some recent examples in which the Commission directed OIA to give high priority to matters that could affect the Commission's decisions regarding safety include the following: "Review of Allegations Management for Diablo Canyon," dated March 1986; "Review of the Inspection and Enforcement History at the Davis-Besse Nuclear Power Plant," dated May 1986; "Allegations Concerning Need for a Justification for Continued Operation at Fort St. Vrain Nuclear Generating Station," dated October 15, 1986; "Allegations of Misconduct By Region IV Management With Respect to Comanche Peak Steam Electric Station," dated November 1986; "Investigation of Alleged NRC Inspector Misconduct at Peach Bottom Nuclear Power Station," dated July 11, 1987; and various OIA reviews relating to NRC's regulation of the Tennessee Valley Authority (TVA). These reports concerned issues regarding the Commission's decisions on near-term operating or restart licenses.

To respond to the Diablo Canyon issue, OIA formed a team of auditors assisted by the Special Assistant to the Director, a Senior Quality Assurance Engineer, a Senior Construction Engineer, and a Senior Resident Inspector. The latter three individuals were on detail to OIA.

OIA's review included discussions with NRC officials involved with looking into Diablo Canyon allegations and visits to Region V and the Diablo Canyon reactor site. OIA also interviewed representatives of the Government Accountability Project (GAP) and 15 allegers who had raised concerns about the NRC's resolution of allegations regarding Diablo Canyon, reviewed NRC Region V's system for processing allegations, and reviewed the more than 200 complaints received from GAP and other allegers about the way the NRC responded to their allegations.

To respond to the Davis-Besse issue, OIA's audit staff reviewed NRC's inspection and enforcement history at that plant from 1983 until the June 9, 1985 incident at the plant. OIA visited the Davis-Besse site and NRC Region III to review inspection and enforcement documentation and discuss NRC's regulatory program. OIA's objective was to respond to three questions raised by the Chairman: (1) did NRC Region III understand the seriousness of the problems at Davis-Besse prior to the incident; (2) did the incident identify weaknesses in the inspection program for operating reactors; and (3) are existing enforcement tools adequate to get corrective action from licensees.

Regarding Fort St. Vrain, OIA assigned the Assistant Director for Investigations and a Senior Construction Engineer, who was detailed to OIA, to respond to an allegation that the NRC staff allowed the Fort St. Vrain Nuclear Power Plant to operate without requiring the licensee to submit a justification for continued operation when such a submission was required. OIA reviewed applicable documentation and records to determine whether the NRC staff allowed Fort St. Vrain to operate for two months without the ability to achieve safe shutdown and without a justification for continued operation.

In responding to concerns regarding Region IV management's handling of safety issues at Comanche Peak, the Special Assistant to the Director was assigned to the investigation. He was assisted by OIA's Senior Quality Assurance Engineer.

OIA investigated allegations that: 1) Region IV management harassed and intimidated inspectors to pressure them to downgrade or delete proposed inspection findings at Comanche Peak; 2) the Region IV Quality Assurance Inspection program at Comanche Peak was inadequate; and 3) data documented in Region IV NRC Form 766, Inspector's Report, was inaccurate. OIA interviewed headquarters, Region IV, and Comanche Peak site employees, as well as a number of consultants. Additionally, OIA reviewed the records pertaining to Region IV's inspection history at Comanche Peak to determine compliance with NRC requirements.

At Peach Bottom, OIA responded to allegations that: 1) during a back shift a Philadelphia Electric Company (PECo) reactor operator had to twice wake a sleeping NRC inspector who was on duty in the Peach Bottom Nuclear Power Plant control room, and 2) NRC inspectors were in the Peach Bottom control room socializing with operators and distracting them from their assigned duties. OIA assigned the Assistant Director for Investigations to conduct an investigation immediately after receiving the allegations. OIA completed its investigation and issued a final report of investigation to the Regional Administrator, Region I, seven weeks from initial receipt of the allegations. OIA's investigation included interviews of PECo and NRC employees and reviews of utility and NRC records.

In late 1985, in response to growing concerns in NRC over the TVA nuclear program, OIA initiated a large audit and investigation program aimed at providing the Commission with information regarding the adequacy of NRC's regulation of TVA. The OIA audit staff reviewed NRC's activities relative to TVA's quality assurance program, welding at Watts Bar, environmental qualification at Sequoyah, electrical/cabling issues at Watts Bar, and the thimble tube event at Sequoyah. In response to specific interest from the Chairman's office, OIA also reviewed the issues of configuration control at Browns Ferry and the main steam valve vault at Sequoyah.

OIA issued audit reports in each of these areas for the Commission's information. On March 1, 1988, the Director, OIA, and the audit team that worked on the electrical/cabling report briefed the Commission on the implications of the findings in that report for the Commission's upcoming decision on the restart of TVA's Sequoyah plant.

OIA's investigations relative to TVA addressed 63 concerns from the Quality Technology Company (QTC) involving alleged misconduct or impropriety on the part of NRC employees in connection with NRC's regulation of TVA. OIA formed a TVA Review Group which was headed by the Special Assistant to the Director, who was assigned as Project Manager. The group was comprised of the Project Manager, two investigators, and a Senior Quality Assurance Engineer. OIA's objective was to ensure the integrity of NRC's regulatory program prior to Commission decisions on licensing or restarting TVA's reactors.

One investigation into the QTC concerns involved the conduct of 38 separate inquiries into allegations of: 1) conflict of interest by NRC employees; 2) nonresponsiveness by the NRC to safety related concerns; 3) improprieties by NRC employees; 4) inaccurate/falsified reports submitted by NRC; and 5) breaches of confidentiality by NRC. OIA interviewed NRC officials at Headquarters, Region II, and the various TVA facilities, as well as TVA and QTC employees. OIA also interviewed allegers and reviewed QTC, TVA, and NRC records. In August 1986, OIA issued five reports to the Commission corresponding to the five categories of allegations received.

QUESTION 49. In testimony before the Subcommittee on October 8, 1987, the NRC stated that the Commission believes that OIA as currently structured affords the best mechanism for conducting independent and objective internal investigative tasks. Yet later in the Chairman's testimony he stated that if a matter involving a Commissioner or his staff surfaced, the Commission would not necessarily have OIA investigate it but that it might, "go to an outside investigator" "if the matter were significant enough." Please explain these two seemingly inconsistent statements? Also, please explain the role of the affected Commissioner.

ANSWER.

The two statements made by Chairman Zech are not inconsistent. The vast majority of OIA investigations do not involve investigation of Commissioners or their staffs. Thus, having OIA report to the Commissioners is a structure that does provide appropriate independence of OIA from those most frequently the subject of OIA investigations. The Chairman's statement concerning consideration of outside review in cases involving Commissioners or their staff does not indicate a problem with the current OIA structure. As discussed in Question 51, as a practical matter a Commissioner cannot interfere with an ongoing OIA investigation as a result of the Commissioner's authority because OIA is not required to terminate or otherwise affect an investigation unless three Commissioners agree that such action is appropriate. The fact that OIA reports to the Commission does not create problems for OIA in conducting investigations involving Commissioners or their staffs significantly different from other government investigatory bodies. In fact, as detailed in our response to Question 54, it is fairly routine to have the Inspector General at other agencies report to and be rated by the head of the agency.

The Chairman's statement that the Commission would not have to go to OIA, but could instead rely on an outside investigator, simply recognizes that an investigation could present a situation where it is appropriate for an outside investigator to be involved. For instance, there might be cases where prior OIA contact with individual Commissioners or members of their staffs might make it appropriate to go outside of the agency for an investigation in order to avoid even the appearance of a conflict of interest.

QUESTION 50: How many allegations of wrongdoing by NRC employees or contractors have been presented to OIA since its inception in 1975?

ANSWER:

Prior to FY 1985, OIA did not record allegations received and their subsequent disposition. Following are the number of allegations received by OIA in Fiscal Years 1985, 1986, 1987, and 1988 (thru February 29, 1988):

FY 1985	FY 1986	FY 1987	FY 1988 To Date
106	111	89	15

1/27/88 BREAUX Q50

(A) Please specify the proportion of those allegations received from internal sources and from external sources.

ANSWER:

FY 1985 = received 106 - 83 inside NRC 78%
23 outside NRC 22%

FY 1986 = received 111 - 78 inside NRC 70%
33 outside NRC 30%

FY 1987 = received 89 - 70 inside NRC 78%
19 outside NRC 22%

FY 1988 = received 15 - 11 inside NRC 73%
(thru Feb. 29, 1988) 04 outside NRC 27%

Total received 321 - 242 inside NRC 75%
79 outside NRC 25%

QUESTION 50. (Continued)

(B) How many of those allegations resulted in OIA investigations? Please provide a breakdown by fiscal or calendar year.

ANSWER:

FY 1985

Allegations Received	106
Allegations Closed Without Action	-5
Allegations Resulting in FY 1986 Investigations	-2
Allegations Resulting in Audits	-1
Same Allegation Received From More Than One Source	-4
Allegations Resulting in FY 1985 Investigative Actions (Inquiries/Investigations)	94

QUESTION 50. (Continued) - 4 -

FY 1986

Allegations Received	111
(Allegations Forwarded from FY 1985)	+2
	113
Allegations Closed Without Action	-17
Allegations Referred to Audit	-2
Allegations Referred to OI	-2
Same Allegation Received From More Than One Source (Includes 2 FY 1985 Allegations)	-18
Allegations Incorporated in Ongoing FY 1985 Investigations	-3
Allegations Resulting in FY 1986 Investigative Actions (Inquiries/Investigations)	71

FY 1987

Allegations Received	89
Allegations Closed Without Action	-8
Allegations Referred to OI	-1
Allegations Resulting in FY 1988 Invest.	-1
Allegations Incorporated in Ongoing FY 1986 Investigations	-5
Same Allegation Received from More Than One Source	-3
Allegations Resulting in FY 1987 Investigative Actions (Inquiries/Investigations)	71

QUESTION 50. (Continued) - 6 -

FY 1988 (thru Feb. 29, 1988)

Allegations Received	15
Allegation Forwarded from FY 1987	+1
Allegations Closed Without Action	-4
Allegations Incorporated in Ongoing FY 1986	-1
Allegations Resulting in FY 1988 Investigative Actions (Inquiries/Investigations)	11

QUESTION 50. (Continued) - 7 -

(C) Of those allegations investigated, how many resulted in findings of wrongdoing?

ANSWER:

As a result of the 94 investigative actions initiated in FY 1985, OIA, as of February 29, 1988, has issued 62 investigative reports, has 4 investigative actions pending, and has closed 17 inquiries to the file, for a total of 83 final actions planned. The difference between 94 actions initiated and 83 final actions planned results from 11 inquiries which were closed out and incorporated into ongoing investigations. Of the 62 investigative reports issued, 27 resulted in findings of wrongdoing.

As a result of the 71 investigative actions initiated in FY 1986, OIA, as of February 29, 1988, has issued 38 investigative reports, has 18 investigative actions pending, and has closed 10 inquiries to the file, for a total of 66 final actions planned. The difference between the 71 actions initiated and 66 final actions planned results from 4 inquiries which were closed out and incorporated into ongoing investigations and 1 inquiry which was closed out to an FY 1987 investigation. Of the 38 investigative reports issued, 12 resulted in findings of wrongdoing.

As a result of the 71 investigative actions initiated in FY 1987, OIA, as of February 29, 1988, has issued 16 investigative reports, has 50 investigative actions pending, and has closed 5 inquiries to the file, for a total of 71 final actions planned. Of the 16 investigative reports issued, 6 resulted in findings of wrongdoing.

QUESTION 50. (Continued) - 8 -

As a result of the 11 investigative actions initiated in FY 1988 (thru February 29, 1988), OIA, as of February 29, 1988, has issued 1 investigative report and has 10 investigative actions pending. The 1 investigative report issued resulted in a finding of wrongdoing.

(D) Of those which resulted in findings of wrongdoing, how many were referred to the Department of Justice? What were the findings of wrongdoing in those cases? Did any result in criminal prosecutions? How many?

ANSWER:

	Findings of Wrongdoing	Referral to DOJ	Prosecution
FY 1985	27	13	0
FY 1986	12	4	0
FY 1987	6	2	0
FY 1988 (thru 12/29/88)	1	0	0

Attached are summaries of the investigations resulting in findings of wrongdoing which were referred to DOJ.

FY 1985 INVESTIGATIONS RESULTING IN DOJ REFERRALS

An OIA investigation was conducted to determine the suitability for continued employment of a resident inspector as a result of concerns about his truthfulness with his former employer regarding his involvement with a nuclear consulting business for which he was President and Co-owner. OIA investigation into this matter disclosed that the resident inspector had not been candid with his former employer about his involvement in a nuclear consulting business. It was also disclosed that the resident inspector's wife was the registered president of the consulting business subsequent to the time the resident inspector was to have divested himself of any involvement in the firm. Prosecution by the Department of Justice (DOJ) for a possible violation of Title 18 USC 1001 was declined.

OIA investigated an allegation that an NRC employee falsified her Personal Qualifications Statement (SF 171) when she applied for employment with NRC by failing to disclose that she had resigned from her previous employment in lieu of being terminated. OIA's investigation substantiated the allegation; however, DOJ declined prosecution in this matter.

An OIA investigation confirmed that an NRC employee falsified time and attendance records on three occasions subsequent to the records being signed by a supervisor. DOJ declined prosecution of this matter.

An investigation disclosed that an NRC employee signed the names of two travelers and fabricated their expenses on official NRC travel vouchers to expeditiously process outstanding travel vouchers. It was also disclosed that the employee's supervisor approved one voucher knowing the information on the voucher was false. DOJ declined prosecution of this matter.

An OIA investigation substantiated that an employee harassed her former supervisor by submitting magazine subscriptions in her supervisor's name. DOJ declined prosecution of this case.

An allegation of personal use of the Federal Telecommunications System (FTS) by an NRC employee was received from the General Accounting Office Hotline. Investigation of the allegation disclosed that the employee used the FTS for personal telephone calls since 1976. Prosecution of this case was declined by the Department of Justice.

During the course of an investigation concerning FTS abuse by an NRC employee, the employee alleged that her supervisor also used the FTS for personal telephone calls. Investigation of this allegation substantiated that the supervisor regularly used the FTS for personal calls. This matter was referred to the Department of Justice; however, prosecution was declined.

An OIA investigation disclosed that a former NRC Licensing Examiner made false statements under oath to the Office of Inspector and Auditor during an earlier OIA investigation. The Department of Justice declined prosecution of this matter.

An OIA investigation into an allegation disclosed that NRC Regional officials made false or misleading statements to the Commission concerning the Region's actions at a power plant. The Department of Justice declined prosecution of this case.

An investigation substantiated that an NRC employee used airline coupons obtained as a result of official travel for his personal benefit. This matter was referred to the Department of Justice; however, prosecution was declined.

A Regional Administrator forwarded information to OIA which indicated that an NRC Resident Inspector may have failed to report to management in a timely manner that the reactor had reached premature criticality. Investigation of this matter disclosed that the Resident Inspector did not learn of the premature criticality event until two weeks after the incident. However, the Resident Inspector did not follow-up with utility management regarding their review and evaluation of the incident. The Department of Justice declined prosecution of this matter.

An OIA investigation was conducted into allegations made to both NRC and the FBI that an NRC employee may have released predecisional information to a vendor, enabling the vendor to affect NRC policy and thereby save the vendor about $50 million in changes it would have had to make to existing reactors. OIA coordinated with the FBI and the Department of Justice on the investigation. The allegations were not substantiated. Accordingly, prosecution was declined by the Department of Justice.

An OIA investigation substantiated that an NRC office director had violated NRC regulations pertaining to official travel, overtime, and time and attendance. This matter was referred to the Department of Justice; however, prosecution of this case was declined.

FY 1986 INVESTIGATIONS TO DATE RESULTING IN DOJ REFERRALS

An OIA investigation confirmed that an NRC employee had been detained by a licensee's security force after he attempted to enter a nuclear plant with a firearm in his briefcase. This case was referred to the appropriate state district attorney for possible violations of state laws; however, prosecution was declined.

An OIA investigation substantiated that an NRC employee used the FTS to make 58 personal telephone calls during an eight month period of time in violation of NRC regulations and Title 18 USC §641. DOJ declined prosecution in this matter.

An OIA investigation substantiated that an NRC employee violated time and attendance procedures, as well as procedures pertaining to overtime. The investigation also substantiated that the employee conducted personal business during duty hours. This case was referred to the Department of Justice; however, prosecution was declined.

An OIA investigation substantiated that an NRC employee made personal telephone calls on the FTS, paid subordinate employees for overtime they did not work, and allowed subordinates to be absent from work without charging leave. This case was referred to DOJ; however, prosecution was declined.

FY 1987 INVESTIGATIONS TO DATE RESULTING IN DOJ REFERRALS

An OIA investigation disclosed that NRC employees brought firearms into an NRC building for the purpose of learning how to assemble and disassemble the weapons. The investigation also disclosed that reloaded ammunition had been transferred on the premises of the NRC building on another occasion. The NRC employees involved in this matter were counseled with respect to their actions and with respect to the General Services Administration and NRC policies concerning prohibited articles in federal spaces. This matter was referred to the Department of Justice; however, prosecution was declined.

An OIA investigation disclosed that a Region III, NRC, inspector received an allegation of a potential safety issue involving possible falsified diesel test records at the Braidwood Nuclear Power Station. The inspector received the allegation from an anonymous source and did not report it to the appropriate Region III officials. This matter was referred to the U.S. Department of Justice for a possible violation of Title 18 USC, Section 1001, regarding a material false statement by omission. After initial interest in this case, the Department of Justice declined prosecution.

QUESTION 52. (A) Since OIA's inception, by year, how many allegations of misconduct involving Commissioners and/or their staffs have been received by OIA for investigation?

ANSWER.

OIA was established by the Commission on January 20, 1975. Since its inception, OIA has received nine allegations potentially involving misconduct by Commissioners and/or their staffs. Three were received in OIA during calendar year 1987, one in 1986, five in 1985. In addition, an OIA audit in 1977 developed an additional potential instance of misconduct by an NRC Commissioner and Commission staff.

(B) What have been the substance of those allegations?

ANSWER:

The substance of the nine allegations potentially involving misconduct by Commissioners and/or their staffs is as follows:

- July 1987 - Based on information received from an NRC staff member, OIA initiated an inquiry to determine if an NRC Commissioner attempted to influence the award of an NRC contract.

- April 1987 - Based on a request from NRC's Office of the General Counsel, OIA initiated an investigation of an alleged improper disclosure of information concerning a Commission vote regarding the Seabrook Nuclear Power Station. (Ongoing)

- April 1987 - Based on a request from a Commissioner, OIA initiated an investigation to determine how an NRC licensee employee obtained a copy of an internal NRC memorandum bearing markings which indicated the memorandum may have been obtained from the Commissioner's office.

- December 1986 - Based on information provided to OIA by an NRC employee, OIA initiated an investigation to determine whether a former NRC Chairman interfered in an NRC personnel action.

- December 1985 - Based on a request for assistance from the General Accounting Office, OIA conducted a review of the use of chauffeured Government motor vehicles by NRC employees. One specific instance identified by GAO for OIA review involved a Commissioner who used a Government motor vehicle for purposes outside the authorized parameters governing use of these vehicles.

- August 1985 - Based on information learned from the Federal Bureau of Investigation (FBI), OIA initiated an investigation to determine whether a member of a Commissioner's staff provided predecisional information concerning an NRC rulemaking issue to Westinghouse Corporation. The information allegedly enabled Westinghouse Corporation to influence a Commission decision on the issue, thereby monetarily benefiting Westinghouse.

- April 1985 - At the request of the Chairman of the NRC, OIA reviewed several programmatic issues raised in a letter to NRC from a Congressman. The Congressman also enclosed a newspaper article containing several allegations against NRC employees, including an allegation that the Chairman lied concerning Commission actions with respect to the Waterford Nuclear Station and attempted to improperly influence the licensing board's deliberations concerning the Shoreham Nuclear Plant.

- April 1985 - At the request of the Chairman of the NRC, OIA initiated an investigation of a wrongful disclosure of confidential information discussed during closed Commission meetings regarding Waterford Nuclear Station. Inquiries from a newspaper reporter and a subsequent article in a newspaper indicating knowledge of the nature of the confidential information precipitated the request for investigation.

QUESTION 52. (Continued) - 4 -

- February 1985 - At the request of the Chairman of the NRC, OIA conducted an investigation into the improper release of transcripts of a closed Commission meeting concerning Diablo Canyon Nuclear Plant outside the NRC. The public release of the transcripts had not been authorized by the NRC; however, the transcripts had been obtained by a television station. Subsequently, the transcripts were introduced in litigation by an intervenor in Federal Court.

- The potential misconduct identified during a 1977 OIA audit was based on a review of an NRC contract awarded for the interior design of office facilities for the Commissioners. This review was part of an OIA audit of NRC's procurement activities and examined the award and administration of the contract amid rumors of possible favoritism.

(C) By year, (sic) allegations have resulted in investigations? Of those in how many was wrongdoing found?

(D) What was the nature of the wrongdoing found?

ANSWER.

Of the nine allegations involving Commissioners and/or their staffs, all resulted in actions by OIA in the form of seven investigations (of which one is ongoing) and two audits. The two issues addressed in audits were reviewed in that manner because they related to larger program issues which were the subjects of ongoing OIA audits. Initial inquiries were made as part of the audits to determine whether there were indications of wrongdoing requiring OIA investigation. In one investigation, OIA was requested by the Department of Justice (DOJ) not to proceed further with its investigation due to DOJ's initiation of an investigation of the same matter.

No instances of wrongdoing by Commissioners were found. However, in one action initiated in December 1985, OIA found that, because of a misinterpretation of the statutory provision governing the use of chauffeured government vehicles, a Commissioner was in violation of this provision on one occasion. In another instance, a 1977 review by OIA of the award and administration of an NRC contract resulted in a referral to the Department of Justice of potential violations by an NRC contractor of Title 18 USC §371, 18 USC §287, 18 USC §1001, and 18 USC §1341.

QUESTION 53. Of the OIA investigations which resulted in findings of wrongdoing by Commissioners, how many, if any were referred to the FBI or the Department of Justice? Of those, how many resulted in criminal action? How many resulted in administrative adverse actions?

ANSWER.

None of the OIA investigative actions identified in the response to Question 52 resulted in findings of wrongdoing by Commissioners; therefore, none were referred to DOJ for prosecutorial consideration or the FBI for investigation. However, in one case initiated by OIA in August 1985, OIA participated in a joint investigation with the FBI and DOJ to resolve the allegations. No OIA actions have resulted in either criminal or adverse administrative actions against a Commissioner. In the matter involving unauthorized use of a chauffeured Government vehicle by a Commissioner, the Commissioner reimbursed the Government a de minimis amount of money for using the vehicle.

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QUESTION 55. The Director testified that the Commission periodically requests briefings on audits and investigations which relate to safety issues affecting near-term operating licenses and other matters requiring Commission decisions. Please provide examples of, and describe investigations which OIA office has briefed the Commission or which relate to near-term operating licenses. Please provide examples of, and describe investigations which OIA has briefed the Commission or which relate to other matters requiring Commission decisions, and indicate what those "other matters" were.

ANSWER.

From March 30, 1983 to March 1, 1988, the Director, OIA, briefed the Commission on the matters listed below. These briefings have primarily involved investigative effort; however, an investigator/auditor team approach was used on several occasions when it was necessary to delve into programmatic issues as well as investigative issues. An (N) indicated that the plant was considered an NTOL at the time of our investigations.

	Date	Plant	Investigation or Audit	Subject/Allegation
1.	03/30/83	TMI	Investigation	Falsification of leak rate test; operator exam cheating

QUESTION 55. (Continued) - 2 -

	Date	Plant	Investigation or Audit	Subject/Allegation
2.	07/26/84	Grand Gulf (N)	Investigation	NRC employee improprieties; ineffective NRC regulation
3.	07/30/84	Diablo Canyon (N)	Investigation	NRC material false statements; QA breakdown
4.	10/22/84	A. Waterford (N)	Investigation	Conflict of Interest
		B. Diablo Canyon (N)	Investigation	Material false statements
		C. Comanche Peak (N)	Investigation	Breach of confidentiality
5.	01/08/85	A. Comanche Peak (N)	Investigation	Welding allegations; failure of OI and the Region to take appropriate action
		B. Diablo Canyon (N)	Investigation	Region V misconduct and false statements

QUESTION 55. (Continued) - 3 -

Date	Plant	Investigation or Audit	Subject/Allegation
	C. Wolf Creek (N)	Investigation	Premature utility notification of OI investigation
	D. Waterford (N)	Investigation	QA breakdown
6. 02/26/85	Waterford (N)	Investigation	Ineffective inspection of Waterford's QA Program
7. 04/23/85	Diablo Canyon (N)	Audit	Breach of confidentiality; failure to followup with allegers

QUESTION 55. (Continued) - 4 -

Date	Plant	Investigation or Audit	Subject/Allegation
8. 05/02/85	A. Comanche Peak (N)	Investigation	Failure of Region IV and/or OI to: investigate TUGCO wrongdoing; take swift regulatory action; investigate harassment and intimidation; investigate falsified inspection reports; improper OI conduct toward an alleger; OI's improper disclosure of confidential information to TUGCO
	B. Catawba (N)	Investigation	Failure of Region II to followup on welding allegations

QUESTION 55. (Continued) - 5 -

Date	Plant	Investigation or Audit	Subject/Allegation
	C. Wolf Creek (N)	Investigation	Premature release of draft inspection reports; improper handling of allegation concerning falsified documents
	D. Shoreham (N)	Investigation	Unresponsiveness of NRC to LILCO employee's concerns
	E. Fermi (N)	Investigation	NRC involvement in altering operator test scores
9. 07/26/85	Diablo Canyon (N)	Audit	Diablo Canyon Allegation Management Program; alleger confidentiality
10. 09/03/85	A. TVA/Watts Bar (N,	Investigation	QTC allegations

QUESTION 55. (Continued) - 6 -

Date	Plant	Investigation or Audit	Subject/Allegation
	B. Comanche Peak (N)	Investigation	Improper inducement to get alleger to drop allegation
11. 10/21/85	A. Fermi (N)	Investigation	Failure of resident to notify Region that plant went critical
	B. TVA	Investigation/Audit	QTC allegations
12. 12/10/85	TVA/Watts Bar (N)	Investigation/Audit	QTC allegations
13. 12/11/85	Fermi (N)	Investigation	Failure of resident to notify Region that plant went critical
14. 01/07/86	A. TVA/Sequoyah	Investigation/Audit	Equipment qualification; thimble tube; design control
	B. TVA/Watts Bar (N)	Investigation/Audit	Welding, cabling

Date	Plant	Investigation or Audit	Subject/Allegation
15. 04/10/86	A. Perry (N)	Investigation	Failure to interview alleger
	B. Comanche Peak (N)	Investigation	Harassment and intimidation
	C. TVA	Investigation/Audit	Welder certifications
16. 06/06/86	A. TVA/Sequoyah	Investigation/Audit	Thimble tube; steam vault; equipment qualification
	B. TVA/Browns Ferry	Investigation/Audit	Configuration control
	C. TVA/Watts Bar (N)	Investigation/Audit	Welding
17. 06/17/86	Radiation Tech	Investigation	Relaxing of NRC inspection effort
18. 07/23/86	A. TVA/Watts Bar (N)	Investigation	Control room operability; failure to act on a safety-related allegation; electrical cables

QUESTION 55. (Continued) - 8 -

Date	Plant	Investigation or Audit	Subject/Allegation
	B. Braidwood	Investigation	Improper taping of a phone conversation; ineffective Region III management
	C. Vogtle (N)	Investigation	Improper handling of alleger's concerns; NRC unresponsiveness
	D. Comanche Peak (N)	Investigation	Inadequate inspection
19. 09/23/86	Kerr McGee Sequoyah Fuels Facility	Investigation	NRC not accomplishing its regulatory responsibilities
20. 10/15/86	Fort St. Vrain (N)	Investigation	NRC allowed Fort St. Vrain to operate without a required justification to continued operation
21. 10/29/86	A. Braidwood	Investigation	Improper release of documents

QUESTION 55. (Continued) - 9 -

Date	Plant	Investigation or Audit	Subject/Allegation
	B. Byron	Investigation	Alleger disagreement with Region III inspection
	C. Comanche Peak (N)	Investigation	Ineffective regulation
	D. Shoreham (N)	Investigation	NRC's unresponsiveness to allegers concerns
	E. Vogtle (N)	Investigation	Misconduct by allegation coordinator
	F. Shearon Harris (N)	Investigation	Disclosure of an unannounced inspection
22. 12/16/86	TVA	Audit	TVA QA program
23. 01/16/87	Fort St. Vrain (N)	Investigation	Misconduct by Region IV management in handling of inspection findings at Fort St. Vrain; failure to pursue licensee wrongdoing; technical concerns
24. 06/09/87	Fort St. Vrain (N)		
25. 06/16/87	Fort St. Vrain (N)		

Date	Plant	Investigation or Audit	Subject/Allegation
26. 02/24/88	South Texas	Investigation	Overregulation; training of inspectors preparation of report prior to completion of inspection (written briefing provided)
27. 03/01/88	TVA/Watts Bar and Sequoyah (N)	Audit	Inspection of cable installation

QUESTION 59. Please provide examples of recent investigations or audits in which "important safety questions were at issue." Describe OIA's findings in these cases and what actions were taken regarding them by the NRC or its staff.

ANSWER.

OIA has conducted numerous audits and investigations in which important safety questions were addressed. The following examples, along with OIA's findings and recommendations, are from the past two years.

I. Audits

Review of NRC Activities Related to Cable Installation at the Tennessee Valley Authority's Watts Bar Nuclear Site (Draft issued to EDO for comment on February 12, 1988)

The objectives of this review were to determine whether NRC had implemented the inspection program in the electrical construction area at Watts Bar and whether the electrical program, as it existed during the height of Watts Bar's construction, could have been expected to disclose the types of problems being addressed today at TVA, such as problems with cable bending radii, excessive sidewall pressure, and improper pullbys.

Based on the review OIA was unable to determine whether the electrical inspection program had been fully implemented at Watts Bar. However, OIA concluded that simply fulfilling the inspection requirements would not necessarily have led NRC to the identification of those cable issues that are being addressed today at TVA. Further, OIA concluded that NRC's Senior Management Team did not fulfill its responsibility in coordinating comments from the various NRC components regarding cable installation concerns at Watts Bar and Sequoyah. OIA's report contains three recommendations directed to the NRC staff that are intended to correct the deficiencies we believed were present during our review.

OIA's report is in draft form and is currently pending review and comment by the Executive Director for Operations. Therefore, we are not aware at this time of what action the staff plans to take in response to it.

Review of NRC's Relationship With TVA's Nuclear Safety Review Staff (December 28, 1987)

This review was conducted in response to a letter dated March 19, 1986, to the Chairman, NRC, regarding: (1) NRC's relationship with TVA's Nuclear Safety Review Staff (NSRS) prior to January 1, 1985, (2) arrangements by which NRC received NSRS reports, and (3) names of NRC employees who received and TVA employees who provided NRC with NSRS reports. OIA's review was based primarily on responses to a survey questionnaire sent to 424 current and former NRC and TVA employees. OIA received 388 responses or about an 88 percent return. OIA also interviewed the former Regional Administrator and Deputy Regional Administrator, Region II, and the former Assistant Director, NSRS.

OIA found there were no formal or informal arrangements between NRC and TVA's NSRS to routinely provide NSRS reports to NRC prior to January 1, 1985. Senior regional management was aware of NSRS' existence and general activity since NRC's inception. Both Region II and NSRS understood that the NSRS organization was not a regulatory requirement. However, NSRS did cooperate with Region II in providing NSRS reports when requested by Region II senior management or by Region II inspectors visiting a TVA site. OIA identified 29 NSRS reports that NRC had access to or received.

OIA's report contained no recommendations, so no actions were required by the staff.

Review of the Issue of Configuration Control at Browns Ferry (September 17, 1987)

The purpose of this review was to offer insights into four specific questions raised by the Chairman's staff that address NRC's identification of the configuration control issue at Browns Ferry and the Commission's involvement in providing guidance to the staff.

OIA's review disclosed that the issue of configuration control at Browns Ferry had been identified by TVA to NRC before TVA shut down the Browns Ferry plants. OIA's report contained four recommendations that addressed configuration control at Browns Ferry and the issue of configuration control in general. The Executive Director for Operations generally agreed with the intent of OIA's recommendations and indicated that corrective action had been or would be taken. OIA has not yet followed up on these recommendations to determine what actions have been taken.

Review of NRC's Review of the Environmental Qualification Program at the Sequoyah Nuclear Plant (July 27, 1987)

The purpose of the review was to look at the program developed by NRC to evaluate Sequoyah's environmental qualification (EQ) program, and to determine NRC's ability to ensure Sequoyah's compliance with 10 CFR 50.49.

The review disclosed that NRC had done a good job of establishing and implementing a program for evaluating the EQ program at Sequoyah. In December 1985 the Director of NRC's Office of Inspection and Enforcement established a set of criteria for NRC's EQ review to follow, and the inspections were performed in accordance with that criteria. In addition, it appeared that NRC performed a review of Sequoyah's EQ program sufficient to ensure that it complied with 10 CFR 50.49.

OIA's report contained no recommendations, so no actions were required by the staff.

Review of NRC's Actions Related to the Thimble Tube Incident at TVA's Sequoyah Facility (July 16, 1987)

This audit was initiated in response to concerns raised by Congressman John Dingell regarding a possible regulatory breakdown by NRC in its handling of an incident during the cleaning of the thimble tubes at TVA's Sequoyah facility. The report identified findings in three areas: (1) programmatic issues that resulted from NRC's inspection and enforcement activities, (2) technical issues that OIA reviewed as a result of the findings in TVA's Nuclear Safety

Review Staff (NSRS) report, and (3) issues resulting from NRC's investigative activities.

The report concluded that NRC's Region II failed to perform a timely and adequate review of the thimble tube incident prior to becoming aware of the TVA's Nuclear Safety Review Staff's (NSRS) investigation from the Wall Street Journal. The report also found that the timeliness and quality of the enforcement actions taken against TVA as a result of this incident were adversely affected by deficiencies in the enforcement staff's response to the incident. Finally, the report concluded that the Office of Investigations failed to perform a comprehensive investigation as to whether TVA management deliberately failed to adequately report the incident in an LER. The report made 11 recommendations to correct the problems identified. The EDO agreed with 10 of the recommendations and stated that corrective actions would be taken. One recommendation, with which the Office of Investigations disagreed, was elevated to the Commission for resolution in accordance with the provisions of NRC Bulletin 1201-4.

OIA has not followed up on the implementation of the 10 recommendations with which the EDO agreed. As of February 29, 1988, the Commission had not yet taken action on the recommendation elevated to it for resolution.

Review of NRC Activities Related to Welding at the Tennessee Valley Authority's Watts Bar Nuclear Site (July 10, 1987)

This audit reviewed NRC's activities relating to welding at TVA's Watts Bar Nuclear Plant (Watts Bar), with particular emphasis on structural welding.

The objectives of the review were to determine if Region II, NRC, performed the welding inspection program in existence during construction of Watts Bar, and if the inspection program as it existed during the height of Watts Bar's welding construction (mid to late 1970's) could have been expected to disclose the recent problems concerning structural welding.

The report states that Region II appeared to have carried out the required NRC inspection program as it existed during Watts Bar's welding construction, which was completed about 1981. The review also found that the NRC welding inspection program used for Watts Bar was not likely to disclose the types or magnitude of structural welding problems discussed in OIA's report.

OIA's report contained no recommendations, so no actions were required by the staff.

Review of NMSS' Regulatory Effectiveness Reviews for Operating Reactors (April 24, 1987)

This review was undertaken to determine how effectively and efficiently NRC was carrying out the Regulatory Effectiveness Review (RER) program at nuclear power plants. Under the RER program NRC assesses the adequacy of safeguards in place at nuclear power plants. The review disclosed that the RER program is beneficial to both NRC and licensees; however, changes were needed to ensure RER findings are being analyzed to meet the objectives of the program and to improve the way reviews are conducted.

OIA's report contained twelve recommendations to address the changes needed in the program. These changes included the need for analyses to determine the cause of weaknesses identified through RERs, and to ascertain whether backfit issues are properly processed in accordance with NRC policies. Other needed changes related to training RER team members, communication of findings to licensees, and RER team members' participation in evaluating the effectiveness of actions taken by licensees.

At the time the final report was issued, OIA closed two recommendations based on actions taken by the EDO to update the RER Program Plan and to emphasize to the RER staff the importance of corroborating information received during RER visits. The EDO agreed to take corrective actions to implement the remaining ten recommendations; however, OIA has not yet followed up to determine the action taken by the staff on them.

Review of the Steam Valve Vault Temperature Issue at Sequoyah (January 14, 1987)

The objective of this review was to determine the extent of NRC's knowledge of and the Commission's involvement in the issue of the main steam valve vault temperature and its effect on the environmental qualification of equipment in the vault room at the Sequoyah nuclear site. OIA's review found that the staff had addressed the issue before TVA shut down the Sequoyah reactor and that NRC Headquarters had been involved in efforts to resolve the issue as early as June 1984. OIA's report contained no recommendations, so no actions were required by the staff.

OIA Review of Quality Assurance at TVA (December 12, 1986)

As part of an overall review of NRC's activities relating to the Tennessee Valley Authority (TVA), the Commission requested OIA to review issues concerning quality assurance (QA) at TVA nuclear plants. The objectives of the review were to determine whether NRC's Region II showed favoritism in its treatment of TVA and whether there was a regulatory breakdown that contributed to the problems and failure of the TVA QA program.

OIA found no evidence to suggest that Region II showed favoritism to TVA in regulating TVA's QA program. Furthermore, the review did not disclose a regulatory breakdown in the sense that Region II did not recognize QA problems at TVA and was not attempting to effect improvements in TVA's QA operations. To the contrary, there was evidence to indicate that Region II recognized TVA's problems and tried to get the utility to improve.

The review found that NRC Headquarters and Region II were not effective in obtaining significant improvement in the operation of the TVA QA program. The reasons for this ineffectiveness are complex and involve issues related to NRC's review and approval of licensee QA programs in general. OIA believes the very nature and history of the TVA organization are also factors contributing to NRC's ineffectiveness.

OIA's report made no recommendations because the NRC was already considering ways to improve inspection of the QA area.

QUESTION 59. (Continued) - 9 -

Review of NRC's Procedures for Assuring Licensee Commitments and NRC Orders are Carried Out (November 13, 1986)

This review was initiated to determine whether NRC had systems in place to assure that NRC orders issued to nuclear power plant licensees and licensee commitments to accomplish agreed upon tasks are carried out.

OIA's review showed that a sizeable effort was underway by the staff since October 1985 to install a new computerized management information system, the Safety Issues Management System (SIMS), which will incorporate, for each reactor, data on all safety issues imposed by NRC, their implementation by the licensees, and NRC's verification of their implementation. While numerous schedules with firm deadline dates for the SIMS had been published and numerous status reports had been issued reporting on percentage of completion, it was not evident that recognition had been given to the reasons why the completion schedule had slipped or why some data for the system was more difficult to collect than other data.

This report contained four recommendations to ensure that SIMS is implemented in a timely and efficient manner. The EDO agreed to implement the recommendations; however, OIA has not yet followed up to determine the actions taken by the staff to implement the recommendations.

Review of the Effect of the CRGR on the Staff's Identification or Resolution of New Safety Issues (May 30, 1986)

This report addressed the concern raised to OIA by then Commissioner Asselstine that the Committee to Review Generic Requirements (CRGR) had a "Chilling effect" on the staff's search for new safety issues or an adverse effect on the staff's search for resolutions to known generic safety issues. OIA's review relied primarily on a questionnaire sent to 994 technical staff in NRC's four program offices at the branch chief level and below.

OIA did not reach any definitive conclusions regarding the effect of the CRGR on the staff because OIA's analysis was based largely on the opinions of the 47 percent of the staff who responded to the questionnaire, and it was difficult to generalize about Commissioner Asselstine's concerns. However, nearly all staff members who responded to the questionnaire believed that the CRGR had a positive place in NRC. In addition, two-fifths (184 respondents) of the staff members who responded believed that the CRGR had a deterrent effect on the identification and resolution of issues, but this represented only about 19 percent of the total staff to whom OIA sent questionnaires. OIA's analysis also showed that, of those 184 staff members, 129 or 70 percent, believed the CRGR had a positive place in NRC. This indicated to OIA that the problem is not so much with the concept of a CRGR, but with how the CRGR functioned.

The report made three recommendations to help improve the staff's perceptions regarding the CRGR and to further ensure management's support of the staff's efforts to identify new safety issues and/or find solutions to known generic safety issues.

Based on OIA's follow-up on these recommendations, the following actions were taken: (1) the EDO instructed office directors and regional administrators to revise office procedures to reflect changes to the CRGR charter resulting from NRC's reorganization and to assure that the staff is familiar with the principle objectives and procedures in the charter; (2) the EDO advised office directors and regional administrators that he expects them to support and encourage the use of the cost analysis support function in the Office of Nuclear Regulatory Research; (3) EDO staff has briefed the technical staff on the CRGR, including cost analysis and value impact assessments; and (4) NRC managers updated office procedures to reflect CRGR charter revisions.

Review of the Technical Specification Review Process for Near-Term Operating Licenses (May 14, 1986)

OIA initiated this review to assess the effectiveness of improvements instituted as a result of problems experienced by NRC with the technical specifications (tech specs) for the Grand Gulf Nuclear Plant. The objectives of the review were to determine if tech specs were reviewed and approved in accordance with policies and procedures established after the problems with the Grand Gulf tech specs, and if such policies and procedures provided for adequate internal control.

The report disclosed that the process for developing, reviewing, and approving tech specs was much improved over the process as it existed at the time of the Grand Gulf situation. The review also showed, however, that additional improvements were still needed in scheduling reviews. Furthermore, OIA found that because there were no formal procedures to implement the corrective actions developed, the process was less effective and provided less accountability than it should have.

The report contained three recommendations: 1) improve scheduling of tech spec reviews; 2) provide for better internal control of the process; and 3) ensure that a complete docket file is maintained for each tech spec review. The recommendation to improve scheduling of tech spec reviews in NRC was closed at the time OIA issued their report because the EDO disagreed with it and OIA had issued a similar recommendation in a previous report with which the Commission also disagreed. OIA follow up on the two remaining recommendations determined that the Office of Nuclear Reactor Regulation has issued formal procedures for conducting tech spec reviews and guidance to employees on placing documents into central files.

OIA Review of the Inspection and Enforcement History at the Davis-Besse Nuclear Power Plant (May 6, 1986)

This report focused on three issues dealing with Davis-Besse's performance from 1983 until the June 9, 1985, incident at the plant. The report showed that Region III realized Davis-Besse was a problem plant from the time it was licensed in 1977. It appears, however, that neither the Region nor Toledo Edison Company (TECO), the licensee, understood how serious the problems were until NRC issued the Systematic Assessment of Licensee Performance (SALP) for Davis-Besse in November 1984. That report gave Davis-Besse Category 3 ratings--the lowest rating--in five of 10 areas evaluated. The inspection program identified several compliance problems; in particular, the 1984 SALP outlined serious operational and management problems. However, it did not--and could not--forecast, prevent, or mitigate the "cascade" of equipment failures that occurred at Davis-Besse on June 9, 1985.

The report made two recommendations: (1) improve the Office of Inspection and Enforcement (IE) inspection guidance in specific areas identified in the report, and (2) determine the efficacy of the revised inspection planning approach developed by Region III and whether it should be used in other NRC regions and incorporated in the operating reactor inspection program.

OIA follow-up found that improved inspection guidance has been issued in the areas identified by OIA, and the Inspection Manual was amended to require site specific inspection plans for each facility, similar to the plans developed in Region III.

Review of the Management of Generic Safety Issues (April 25, 1986)

The objective of this review was to assess NRC's action in response to a 1984 GAO report entitled Management Weaknesses Affect Nuclear Regulatory Commission Efforts to Address Safety Issues Common to Nuclear Power Plants.

OIA evaluated NRC's action on each of the 11 recommendations made by GAO and found that, overall, NRC had taken action or action was underway on GAO's recommendations. OIA noted that some problems still existed, however, regarding the staff's knowledge and confirmation of actions taken by licensees to implement multi-plant requirements. Some of these multi-plant requirements resulted from the resolution of generic issues.

OIA's report contained no recommendations, so no additional action, outside that required to implement GAO's recommendations, was required by the staff.

Review of Allegations Management for Diablo Canyon (March 25, 1986)

This review was performed in response to a letter from an alleger to then Commissioner Zech. The alleger claimed there were breaches of confidentiality and a lack of feedback to allegers at the Diablo Canyon Nuclear Power Plant (Diablo Canyon). OIA's review included discussions with NRC officials involved with resolving Diablo Canyon allegations, visits to Region V and the Diablo Canyon site, and interviews with a representative of the Government Accountability Project (GAP) and 15 allegers who had raised concerns about the NRC's resolution of allegations regarding Diablo Canyon.

OIA's report disclosed that, although NRC did a credible job of managing the vast number of allegations received about Diablo Canyon, several problems existed. These problems centered around the method and degree to which several allegations were addressed by Region V and the breach of confidentiality of several allegers. The report contained 15 recommendations to improve NRC's overall management and processing of allegations.

OIA's follow-up on the actions taken on the 15 recommendations disclosed that corrective actions had been taken on all. Specifically, NRC revised Manual Chapter 0517, Management of Allegations, effective June 20, 1987, and distributed it to all NRC employees. Manual Chapter 0517 revisions closed 13 of OIA's recommendations. OIA also found that NRC Form 307, "Allegation Data Input," records data on resolution of allegations, and that Office Allegation Coordinator positions had been established for each office.

II. Investigations

Braidwood - Investigation of Allegation of Nonresponsiveness to Allegation

OIA received information that an NRC Region III inspector may have acted inappropriately in response to an anonymous allegation of a potential safety issue involving possible falsified diesel test records at the Braidwood Nuclear Power Station. OIA's investigation disclosed that the inspector received the allegation from an anonymous source and did not report it to the appropriate Region III officials. Region III conducted a special inspection, which partially substantiated the information provided by the anonymous source. Region III management initiated a personnel action against the Region III inspector.

Investigation of Alleged NRC Inspector Misconduct

OIA received information that the Philadelphia Electric Company (PECo) had alleged that during a back shift a PECo reactor operator had to twice wake a sleeping NRC inspector who was on duty in the Peach Bottom Nuclear Power Plant control room. OIA's investigation did not substantiate the allegation. The investigation disclosed that while on duty in the Peach Bottom control room, an NRC inspector became very tired and, in accordance with his instructions, left the control room to revive himself while a second NRC inspector monitored the operation of the control room. No action by NRC management was required as a result of this report.

Shoreham 1 - Alleged Lack of Follow Up With Alleger

OIA received information from the Chairman for the Atomic Safety and Licensing Board in the Matter of Long Island Lighting Company (Shoreham Unit 1) which indicated that two NRC employees may not have followed up with an alleger concerning allegations the alleger purportedly made to them. OIA's investigation determined that the two NRC employees told the alleger that he would be interviewed a second time to obtain additional concerns the alleger apparently had. However, no follow up interview was conducted by NRC. As a result of a recommendation by OIA, the NRC staff recontacted the alleger and requested he provide the staff any safety concerns he may have with regard to the Shoreham facility.

Byron Nuclear Station - Nonresponsiveness to Safety Concerns, Region III

OIA received information from a former contractor at Byron Nuclear Station that alleged there were discrepancies in the as-built drawings of safety-related piping systems at Units 1 and 2 at Byron. The alleger contended that because of the discrepancies, the seismic analysis and seismic calculations for Byron were incorrect. The alleger claimed he had raised these concerns to the Region III staff; however, he believed Region III did not properly address them. OIA's investigation disclosed that the actions by Region III to address the alleger's technical issues were consistent with NRC policies and procedures for handling allegations of a technical nature. OIA referred the alleger's technical concerns to the NRC staff for resolution.

Allegations of Misconduct by Region IV Management with Respect to the Comanche Peak Steam Electric Station

OIA received information from current and former NRC employees and contractors that alleged that Region IV management harassed and intimidated inspectors to pressure them to downgrade or delete proposed inspection findings at Comanche Peak. OIA also determined that two other issues warranted investigation: (1) the Region IV Quality Assurance Inspection Program at Comanche Peak was inadequate, and (2) data documented in Region IV's NRC Form 766, "Inspector Report," was inaccurate. The OIA investigation disclosed that a Region IV supervisor had lengthy disagreements with a Region IV inspector regarding the downgrading of inspection findings at Comanche Peak. Additionally, it was disclosed that Region IV apparently did not satisfy the frequency requirements for quality assurance inspections at Comanche Peak and the data recorded on the NRC Forms 766 pertaining to Comanche Peak were inaccurate and unreliable. The NRC staff took several actions in response to the OIA investigation.

TVA - Allegations of NRC Misconduct

OIA received 63 concerns from the Quality Technology Company (QTC) involving alleged misconduct or improprieties on the part of NRC employees in connection with NRC's regulation of TVA. The concerns were divided into five categories: (1) Alleged Conflict of Interest by Former NRC Employees; (2) Alleged Nonresponse by the NRC to Safety Related Concerns; (3) Alleged Improprieties by NRC Employees; (4) Alleged Inaccurate/Falsified Reports Submitted by NRC; and (5) Alleged Breaches of Confidentiality by NRC.

OIA conducted 38 separate inquiries regarding these allegations. In the first category, OIA developed no information to indicate conflict of interest or wrongdoing affecting NRC's regulation of TVA. In the second category, OIA inquiry showed that in the ten alleged incidents of nonresponsiveness the NRC acted appropriately; however, in two instances, the allegers disagreed with the conclusions documented in the pertinent NRC inspection reports and in one instance the alleger was not informed of the results of the NRC action. Additionally, in another instance the alleger denied the statements attributed to him in the QTC concern referred to OIA.

In the third category, six of the seven QTC concerns regarding alleged improprieties by NRC employees were unfounded. The remaining allegation, which concerned an NRC employee under the influence of alcohol at a TVA facility, was substantiated; however, Region II was already aware of the situation and had counseled the individual. In the fourth category, OIA inquiry showed that two concerns referred by QTC alleging falsified NRC inspection reports were unsubstantiated. The remaining concern in this category referred by QTC pertained to technical issues associated with NRC's review of the Watts Bar Nuclear Plant control room design. Technical information developed by OIA inquiry was forwarded to the NRC staff for review. Finally, in the fifth category, the three allegations of breaches of confidentiality were unsubstantiated.

Comanche Peak - CASE Allegations of NRC Staff Improprieties

The Citizens Association for Sound Energy (CASE) provided OIA with information indicating that the NRC Technical Review Team (TRT) improperly handled a 1984 allegation concerning an overexcavation beneath the Comanche Peak Unit 1 containment building. The OIA investigation developed no evidence to indicate the TRT did not properly review the 1984 allegation; however, the OIA investigation did disclose that the TRT had not contacted the individual who initially made the allegation of overexcavation as required by NRC policy. In response to the OIA report, the NRC staff contacted the original alleger.

V. C. Summer Plant - Employee Integrity Allegation

OIA received an anonymous allegation that questioned whether an NRC resident inspector at the V.C. Summer Nuclear Station had the educational credentials and background he listed on his resume. OIA's investigation disclosed no improprieties on the part of the NRC resident inspector.

Nonresponsiveness by NRC to Concerns Regarding Shearon Harris and Brunswick

OIA received information that alleged that the Region II Office of Investigations (OI) Field Office took no action in response to concerns brought to them about the Shearon Harris Nuclear Power Plant and the Brunswick Steam Electric Plant. Additionally, it was alleged that a Region II inspector had provided utility personnel advance notice of an unannounced NRC inspection at Shearon Harris. The OIA investigation did not disclose any improprieties on the part of the NRC staff.

Braidwood - Allegations Regarding Concerns Expressed by the NRC Resident Inspector

OIA received information that the former NRC Senior Resident Inspector at Braidwood alleged unreceptiveness on the part of Region III project management to safety-related issues raised at Braidwood by the inspector. OIA investigation disclosed that the safety concerns raised were appropriately addressed by Region III, and no wrongdoing was identified.

Diablo Canyon - Alleger's Concerns About the Adequacy of OI Case 5-84-023

OIA received information that questioned the adequacy of Region IV's disposition of his allegations regarding Diablo Canyon. The alleger called into question the adequacy of the OI investigation which addressed his concerns. OIA's investigation concluded that the OI investigation was thorough and substantiated the conclusions reached by them.

Limerick - Impropriety Concerning Enforcement Actions

OIA received information that alleged that Region I characterization of violations at the Limerick Nuclear Power Station was purposely and obviously done in a manner to minimize the gravity of the situation. The alleger provided information which specifically referred to a 1986 Region I inspection report. OIA's investigation disclosed that the findings of the Region I inspection at Limerick, which the alleger referred to, and the subsequent Region I enforcement action were in accordance with NRC standards and directives. Additionally, no information was developed to indicate that NRC personnel in Region I displayed bias toward Limerick or the Philadelphia Electric Company, the licensee for Limerick.

QUESTION 60. Please specify reviews done by OIA of NRC staff conduct which were needed by the Commission to make licensing and regulatory decisions.

ANSWER.

OIA has performed several audits and investigations of NRC staff conduct which were needed by the Commission to make licensing and regulatory decisions. These include the following:

Review of Statements That NRC Staff Offices Apply Pressure on National Laboratories, dated August 1984;

OIA Review of Documents Relating to the Commission's October 17, 1983 Letter to Congressman Udall, dated December 1985;

Review of Allegations Management for Diablo Canyon, dated March 1986;

Review of the Inspection and Enforcement History at the Davis-Besse Nuclear Power Plant, dated May 1986;

Review of the Effect of the CRGR on the Staff's Identification or Resolution of Safety Issues, dated May 1986;

Allegations Concerning Need for a Justification for Continued Operation at Ft. St. Vrain, dated October 1986;

Allegations of Misconduct By Region IV Management With Respect to Comanche Peak Steam Electric Station, dated November 1986;

Allegations of Internal Pressure to Halt an OI Investigation at Farley (ongoing); and

Allegations of Possible Misconduct by Region IV Management Involving Ft. St. Vrain (ongoing).

OIA has addressed the NRC staff's action in several audits of NRC's regulatory activities at TVA facilities. These audits have looked both at broad issues, such as quality assurance, welding, and environmental qualification, and specific issues, such as the thimble tube event at Sequoyah, the Main Steam Valve Vault at Sequoyah, and Configuration Control at Browns Ferry. Most recently, OIA addressed the staff's handling of certain cabling issues at Watts Bar and the relationship of those issues to the Sequoyah site. These issues include the implementation of the NRC inspection program, closure of inspection findings, and the staff's review of a consultant's report relating to Watts Bar cabling issues. In addition, OIA has conducted several investigations of allegations relating to NRC's relationship with, and regulation of, TVA.

QUESTION 63. In the case involving the apparent unauthorized distribution of an NRC memorandum from Commissioner Roberts' office to an industry representative which came to light in March of 1985, it was decided that under the more specific and direct Reorganization Plan of 1980, the investigation of the matter was properly the responsibility of the Commissioner involved, not OIA.

(A) Do you agree that the Reorganization Plan of 1980 requires or allows the investigations of matters involving alleged wrongdoing by Commissioner's staff to be investigated by that Commissioner, personally?

ANSWER.

Section (1)(c) of the Reorganization Plan makes each Commissioner responsible for the supervision of employees in his office. We view this as authorizing, but not requiring, a Commissioner to investigate alleged wrongdoing by his staff.

QUESTION 63. (B) What happens when a Commissioner concludes his own investigation? Is the matter then referred to OIA or OI for further investigation?

ANSWER.

The answer to question 65 provides the policies and procedures regarding the referral of allegations of wrongdoing by Commissioners or their staffs to OIA.

QUESTION 64. To your knowledge, has it been the practice that cases involving Commissioner's staff are investigated solely within the involved Commissioner's office, not OIA?

ANSWER.

The answer to question 52 lists allegations of misconduct involving Commissioners and/or their staff that have been investigated by OIA. The answers to question 65 describes the policies and procedures for OIA investigations of Commissioners and their staff. These answers demonstrate that it generally has not been the practice, nor is it our policy, that cases involving Commissioner's staff are investigated solely within the involved Commissioner's office.

QUESTION 65. What is the current policy regarding the referral of allegations of wrongdoing by Commissioners or their office staffs to OIA?

ANSWER.

The policy regarding the referral of allegations of wrongdoing by Commissioners or their office staffs is addressed in the attached memorandum. It concludes that no basis has been found in existing written guidance to suggest that different procedures apply to investigations of Commissioners or members of their staffs and to other NRC employees.

Attachment:
4/17/87 Memo fm W.G. Parler
to the Commission*

*Previously submitted for the record.

QUESTION 70. Did OIA refer any matters to the Justice Department for possible criminal investigation as a result of testimony given by NRC employees at the hearing conducted before the Congress in June, 1987? Please state your reasons for making those referrals.

ANSWER.

Based on a discussion between staff of the Office of Governmental and Public Affairs, NRC, and the Committee, it is our understanding that this question relates to an April 8, 1987 hearing. OIA did refer two matters to the Federal Bureau of Investigation for possible criminal investigation as a result of testimony given by certain NRC employees at a hearing conducted by the Senate Committee on Governmental Affairs on April 8, 1987.

The first referral involved allegations against Mr. George A. Mulley, Jr., Assistant Director for Investigations, Office of Inspector and Auditor. The referral was based on an April 15, 1987, letter to OIA from T.F. Westerman, Chief, Reactor Safety Branch, Division of Reactor Safety and Projects, Region IV, in which Mr. Westerman alleged that Mr. Mulley "has either perjured himself with regard to the issue of intimidation and harassment or lied to the staff." Mr. Westerman's memorandum, along with Mr. Mulley's prepared testimony and a statement from William L. Brown, Regional Counsel, Region IV, regarding a conversation he and Paul Check, Deputy Director, Region IV, had with Mr. Mulley regarding the Comanche Peak report, were sent by OIA to the Director, FBI, on April 15, 1987.

The second referral involved allegations regarding Mr. Ben B. Hayes, Director, Office of Investigations. This referral was made based on an April 22, 1987 memorandum to OIA from James M. Cutchin, IV, Legal Assistant to Commissioner Thomas Roberts, in which he stated that he believed Ben B. Hayes, Director, Office of Investigations, "may have intentionally provided-false and misleading testimony to a Committee of the United States Senate in violation of 18 USC 1001 and/or other criminal statutes." OIA forwarded this memorandum to the Director, FBI, on April 24, 1987.

The allegations concerning both Mr. Mulley and Mr. Hayes were appropriately referred to the Office of Inspector and Auditor. According to 10 CFR 0.735-3(a)(9) NRC employees shall "Report to the Director of their Office all allegations or indications of misconduct, including fraud, graft, corruption, and diversion of NRC assets by NRC or contract employees; however, when the exigencies of the circumstances dictate, employees may make such reports directly to the Office of Inspector and Auditor."

OIA referred Thomas F. Westerman's allegation of possible perjury by Mr. Mulley to the FBI after OIA consulted with the NRC General Counsel. Violation of Federal criminal provisions concerning perjury are appropriate for referral to the Department of Justice. Similarly, the allegation concerning Mr. Hayes also involved possible perjury.

These referrals of allegations to the FBI for investigation were made for two reasons. First, the allegations involved alleged violations of criminal statutes. Second, it would not have been appropriate for OIA to conduct an

QUESTION 70. (Continued) - 3 -

investigation because the allegations involved Mr. Mulley, the key investigative manager in OIA, and Mr. Hayes, whose testimony, in part, related to OIA investigative matters. Under the circumstances, OIA had no choice but to refer these matters to the FBI.

QUESTION 71: On Page 2 of the Director's statement, dated October 8, 1987, she indicated that in the vast majority of cases, conclusions in OIA's investigation reports are accepted by management, please indicate some cases in which OIA's investigative conclusions are not accepted by management, and what happened in those cases?

ANSWER:

The following two instances are cases in which NRC management did not accept the conclusions contained in OIA investigation reports. The first instance concerned a Report of Investigation entitled "Comanche Peak - GAP Allegations (Lack of NRC Action When Notified of Wrongdoing by Utility)", which was issued to the Executive Director for Operations (EDO), on August 30, 1985. This OIA investigation addressed three separate incidents of alleged wrongdoing by NRC regional staff regarding their response to reports of wrongdoing by an NRC licensee. OIA investigation of two of the three alleged incidents disclosed that the regional staff acted appropriately. However, OIA concluded with respect to the third incident that regional staff was not sufficiently sensitive to the situation as it developed and should have responded more promptly.

By memorandum dated October 7, 1985, the EDO challenged OIA's conclusion with respect to the third incident and expressed his opinion that from his review of the OIA report the regional staff was too sensitive to the incident. In addition, the EDO expressed his opinion that OIA investigative observations not indicating misconduct on the part of the staff could be addressed in a separate memorandum and not in the OIA report.

OIA responded to the EDO's October 7, 1985 memorandum with an October 10, 1985 memorandum reiterating and clarifying the findings contained in the investigation report. The EDO, in turn, replied to OIA by memorandum dated October 25, 1985, to clarify his position in this matter. Since there was no wrongdoing identified by the OIA investigation, this exchange of differing views between the EDO and OIA was not pursued further by either party.

The second instance in which NRC management did not accept OIA investigative conclusions concerns a Report of Investigation entitled "Diablo Canyon - Allegations of Misconduct by NRC Employees," which was issued to the EDO on February 3, 1986. This OIA investigation addressed six instances where regional-based NRC officials allegedly made false or misleading statements to the Commission. These allegations were identified during an OIA review of NRC's allegations management system for the Diablo Canyon Nuclear Plant. The OIA investigation concluded that in two of the six alleged instances, the Regional Administrator failed to give a direct answer or provided inaccurate information during testimony before the Commission.

In the third instance, OIA concluded that a regional official unintentionally provided inaccurate information to the Commission concerning the receipt of information pertaining to an intervenor's allegation. The OIA investigation concluded with respect to the three remaining alleged instances that the Regional Administrator had accurately responded to the questions at issue.

The Department of Justice (DOJ) reviewed this OIA investigation report; however, on January 28, 1986, DOJ notified OIA that it had no prosecutorial interest in the matter.

By memorandum dated March 17, 1986, the Acting Executive Director for Operations (EDO) advised OIA that he had carefully reviewed the OIA investigation report and was concerned that the conclusions reached in the report were contradicted by the evidence considered by the OIA investigator. Furthermore, the EDO informed OIA in the memorandum that he had asked a special panel comprised of three senior NRC officials to review the OIA report, and they had been instructed to advise him of an appropriate course of action based on their review. The March 17, 1986 memorandum additionally indicates that the special panel's report on this matter, dated February 26, 1986, essentially found that "the OIA conclusions are not supported by the evidence cited," and the EDO completely agreed with the panels analysis. Also, the EDO stated in the memorandum that he proposed to take no further action on the basis of the OIA report; however, he had cautioned senior staff managers of the importance of complete accuracy in communications with the Commission.

In a July 18, 1986 memorandum, OIA addressed the EDO's comments point-by-point in order to clarify issues in the OIA report which the special panel and the EDO apparently misunderstood. OIA also advised the EDO that unless OIA heard to the contrary, the matter was considered closed.

On August 6, 1986, the OIA Director and the investigator who conducted the OIA investigation of this matter met with the EDO and special panel to discuss the OIA report and the issues which were in contention.

This August 6, 1986 meeting was followed by an August 20, 1986 memorandum from the EDO which highlighted issues relating to the investigation on which OIA and the EDO agreed as a result of their meeting. This August 20, 1986 memorandum also indicated that the EDO remained in disagreement with certain aspects of the OIA investigation report; however, it pointed out that it was important to put the debate regarding the matter to rest. This particular instance where NRC management did not accept OIA investigative conclusions was not pursued further by either party.

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

April 27, 1988

The Honorable John Breaux, Chairman
Subcommittee on Nuclear Regulation
Committee on Environment and Public Works
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

On March 14, 1988 Chairman Zech responded to questions concerning the Office of Inspector and Audits (OIA) contained in your January 27, 1988 letter. I am enclosing answers to questions 67 and 68, which were inadvertently not included in that letter.

Portions of the enclosed answers have not been made public. I request that you preserve this confidentiality by restricting its access and use to members of your Subcommittee.

Sincerely,

John C. Bradburne, Director
Congressional Affairs
Office of Governmental and
Public Affairs

Enclosures:
As Stated

cc: The Honorable Alan Simpson

QUESTION 67. The Director indicated that OIA periodically briefs the Commission at its request on investigations which relate to safety issues affecting near-term operating licensees--

(A) Approximately how much of OIA's inspection work relates to safety issues involving licensees?

ANSWER:

Sixty-seven investigations and/or inquiries opened by OIA during FY 1985, 1986, and 1987 had a nexus to the public health and safety and potentially involve licensees. These represent about 25% of the cases opened by OIA in those three years. Generally, because of their complexity, cases of this type require greater investigative effort to close. For example, during the first four months of FY 1988, OIA spent about 61% of its investigative resources on cases involving safety-related issues.

About 50% of OIA's audit staff reports to the Assistant Director for Technical Audits. All of the audits performed by that group have the potential for involving safety-related issues. In Fiscal Years 1985-1987, OIA issued 22 audit reports relating to NRC's technical activities. Those 22 reports represent about 45 percent of all the audit reports issued by OIA in those three years.

(C) To what extent might such advice to the Commission be affected by the establishment of an independent Inspector General Office?

ANSWER.

The statutory mission of the NRC is the protection of public health and safety. The establishment of an independent inspector general office would cause the Commission to lose its authority to direct the internal audit/investigative function to give priority to issues that the Commission and the Executive Director for Operations (EDO) determined were critical to public health and safety. Consequently, because much of the internal audit/investigative staff's work is safety-related, the removal of the authority of the Commission to direct the internal audit/investigative staff into quick action could impede the Commission's and EDO's ability to obtain relevant information needed for regulatory safety-related decisions. The mission of the NRC to protect public health and safety must take precedence over all other competing interests. A statutory inspector general, beyond the authority of the Commission, who failed to appreciate the significance of a potential safety issue could inadvertently thwart the Commission from carrying out its responsibilities to the public.

QUESTION 68. Please characterize the relationship between OIA and the Department of Justice. Any problems? How and if so, do you suggest they might be corrected?

ANSWER.

OIA is responsible for making criminal referrals to the Department of Justice (DOJ) and to the Federal Bureau of Investigations when suspected criminal activities by NRC employees or contractors are detected.

When criminal activities are first suspected, OIA makes a preliminary referral of the matter either orally or in writing to DOJ. Preliminary referrals are usually made (1) because declination of prosecution is likely due to the lack of evidence, or because of the improbability of developing evidence, the relatively minor nature of the offense, or the relatively technical nature of the alleged violation; (2) because there are sound reasons to believe the ongoing investigation should be conducted by DOJ; or (3) to obtain a legal opinion concerning whether a potential criminal violation exists. Oral referrals are followed by a letter to confirm the referral and the opinions rendered by DOJ.

On other than preliminary referrals, suspected criminality is referred by OIA to DOJ by forwarding the OIA Report of Investigation with a cover referral letter. The purpose of the cover referral letter is to impart information helpful to DOJ in making a prosecutive decision. DOJ informs OIA in writing once a decision regarding criminal prosecution is reached.

OIA is not aware of any problems between OIA and DOJ.

CHAIRMAN

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

April 28, 1988

The Honorable John Breaux, Chairman
Subcommittee on Nuclear Regulation
Committee on Environment and Public Works
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

In my February 24, 1988 response to question 13 of your January 27, 1988 letter, I promised to provide additional information on NRC's fire protection requirements. This information is enclosed.

Sincerely,

Lando W. Zech Jr.

Lando W. Zech, Jr.

Enclosure:
As Stated

cc: The Honorable Alan Simpson

QUESTION 13. On April 14, 1986, the NRC issued Generic Letter 86-10 implementing the new Appendix R interpretations.

(A) How many exemptions have been requested by utilities since NRC issued GL 86-10?

ANSWER.

The answer to Questions 13A, B, and C are presented in terms of exemptions and deviations. The fire protection criteria delineated in Appendix R to 10 CFR Part 50 are applicable as regulation only to those nuclear power plants licensed to operate prior to January 1, 1979. Variances from these criteria are required to be approved under the exemption process specified in 10 CFR 50.12. For the remaining power plants licensed since that date, utilities demonstrated compliance with NRC fire protection requirements by comparing their fire protection programs to the criteria of Appendix R as well as those contained within Branch Technical Position 9.5-1, applied as guidelines, and identified and justified variances as deviations.

It should be noted that since the fire protection criteria contained in the Branch Technical Position are more extensive than those in Appendix R, no significance should be applied to the total numbers of deviations relative to the total number of exemptions.

Utilities have requested 148 exemptions and 195 deviations since NRC issued GL 86-10 on April 24, 1986. The status and nature of these exemptions and deviations are summarized in (C) below. It should be noted that there are differences from plant to plant in the design and layout of components and cabling which result in the variances which were the subject of the exemptions and deviations. Where exemptions and deviations were granted, the staff concluded that a level of safety equivalent to that intended by the fire protection requirements was achieved.

QUESTION 13. (Continued)

(B) Which utilities filed for exemptions?

ANSWER.

The utilities that filed for exemptions and deviations and the plants for which they filed are:

Utility	Plant	Exemption(E)/ Deviation (D)
Arkansas Power and Light	Arkansas 1/2	E
Arizona Public Service	Palo Verde 1/2/3	D
Boston Edison	Pilgrim	E
Carolina Power and Light	Brunswick 1/2	E
	S. Harris	D
Central Power and Light	South Texas 1/2	D
Commonwealth Edison	Braidwood 1/2	D
	Byron 2	D
	Dresden 2/3	E
	Quad Cities 1/2	E
	Zion 1/2	E
Consumers Power	Big Rock Point	E
Florida Power and Light	Turkey Point 3/4	E
Georgia Power	Hatch 1/2	E
Indiana and Michigan Electric	D.C. Cook 1/2	E

ANSWER. (Continued)

Utility	Plant	Exemption(E)/ Deviation (D)
Iowa Electric Light and Power	Duane Arnold	E
Jersey Central Power and Light	Oyster Creek	E
Metropolitan Edison Company	Three Mile Island 1	E
Mississippi Power and Light	Grand Gulf	D
Niagara Mohawk Power Corp.	Nine Mile Point 2	D
Northeast Nuclear Energy	Millstone 1/2	E
Pennsylvania Power and Light	Susquehanna 1/2	D
Public Service of Colorado	Fort Saint Vrain	E
Public Service Electric and Gas	Salem 1	E
	Salem 2	D
Southern California Edison	San Onofre 1	E
	San Onofre 2/3	D
Wisconsin Electric Power	Point Beach 1/2	E
Wisconsin Public Service	Kewaunee	E

(C) What is the current status of those exemption requests?

ANSWER.

As of March 1988, 94 exemptions and 118 deviations have been granted; 4 exemptions and 1 deviation have been denied; and 50 exemptiors and 76 deviations are under review.

The scope of the exemptions and deviations granted included the presence of intervening combustible materials between redundant shutdown divisions; the lack of a fire supression system in an area where redundant shutdown divisions are located; and the presence of fire barriers which have a fire rating of less than three hours, as required by Appendix R. In granting exemptions and deviations, the staff concluded that a level of safety equivalent to that intended by the fire protection requirements was achieved.

STATEMENT OF ANTHONY J. BRODERICK, ASSOCIATE ADMINISTRATOR FOR AVIATION STANDARDS, FEDERAL AVIATION ADMINISTRATION, BEFORE THE SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS, SUBCOMMITTEE ON NUCLEAR REGULATION, CONCERNING THE FAA'S REGULATORY PROCESSES. OCTOBER 20, 1987.

Mr. Chairman and Members of the Subcommittee:

I am Anthony J. Broderick, FAA's Associate Administrator for Aviation Standards. I am responsible for FAA's safety programs concerning our Nation's airlines, including the development of safety regulations and the conduct of our surveillance and inspection programs. I am pleased to have the opportunity to appear before the Subcommittee to describe for you today our regulatory and compliance approach to the airline industry. We believe that these programs have worked well and have demonstrably assisted in fostering an outstanding safety record in the air transportation industry.

The FAA has regulations governing virtually all aspects of aviation safety. I would like today to narrow my discussion to the process we use in the initial safety certification of an airline which seeks to provide service to the public. I believe that process is illustrative of the kind of detailed and cautious measures we use in fulfilling our safety responsibilities in all areas. I would also like to provide you with a brief insight into the way we promulgate regulations and enforce compliance with those regulations. Before doing so, however, I believe it is important to highlight for the Subcommittee the general way in which the Federal Government approaches its overall aviation responsibilities, since I believe this approach works well.

In brief, aviation safety is the responsibility of the FAA. The economic aspects of aviation were traditionally the responsibility of the Civil Aeronautics Board. With the sunset of the Board, the remaining economic responsibilities were assumed by the Office of the Secretary of Transportation (OST). The National Transportation Safety Board is an independent agency with responsibility for investigating aircraft accidents, determining probable cause, and issuing safety recommendations to the FAA. This overall framework has proven highly effective in focusing the FAA's efforts on safety, while at the same time providing us with an independent assessment of perceived problems in the system and recommendations for dealing with those issues.

The process used by the FAA to develop regulations conforms to the Administrative Procedure Act. That process typically involves the issuance of a Notice of Proposed Rulemaking (NPRM), which is published in the Federal Register to offer an opportunity for public comment. We then shape a final rule following a full review of the comments received. In some cases, we hold informal hearings to apprise the public of our rulemaking proposal and to seek additional comments. Also, in some instances, we issue what we call an Advance Notice of Proposed Rulemaking to solicit information on which to base a proposed rule that would then be issued in an NPRM.

Our rules are developed from a variety of sources. Many proposals emanate from internal FAA analyses. Some rules are developed following recommendations from the National Transportation Safety Board or are based on proposals received from airlines, manufacturers, professional associations or unions. We also receive petitions for rulemaking from outside parties. Proposals may also emanate from FAA-industry seminars, conferences, or symposia on safety matters. In short, there are a variety of ways in which regulatory concepts are formulated. We typically work closely with the aviation community in shaping an approach to dealing with an issue before proposing an NPRM. We are also vitally interested in having the benefit of their views concerning our proposals when they are published for public comment. As a policy matter, though, we discourage ex parte contacts during the course of a rulemaking. If such contacts occur, we place in the rulemaking docket a summary of the contact which occurred.

I believe we are genuinely fortunate in aviation that the community shares the common goal of enhancing safety. In that regard, we generally find that the aviation community is as interested as we in developing and promulgating reasonable requirements that will advance safety. On the whole, we operate in a climate in which there is impetus for positive change, although this is not to suggest that there are not disagreements among the constituent elements of the community over how to attain a given safety objective.

As I noted earlier, our regulations govern the entire facet of aviation safety activities. Although many are detailed and specific in nature, where feasible, we often describe rules in a "performance" oriented way, permitting regulated parties latitude in developing an approach that will satisfy the intended safety objective of a rule. For example, rather than describing the particulars of how an aircraft must be designed--since this would stifle creativity and innovation--our aircraft certification regulations typically prescribe objectives and standards which must be demonstrated by a particular design. One illustration might be a requirement that an aircraft be capable of sustained flight after loss of an engine rather than a requirement that an aircraft have a specific number of engines.

The regulations which govern the safety certification of new air carriers are found in Part 121 and Part 135 of the Federal

Aviation Regulations and Special Federal Aviation Regulation 38-2. Guidance on how to apply these regulations to applicants for certification is supplied to our field facilities through our airworthiness and flight operations orders or "handbooks" which are developed in headquarters. The handbook guidance is further supported or elaborated through memoranda and frequent telephone conversations between headquarters and regional staff.

Since 1958, the process used by FAA to certify new air carriers has remained basically the same. An applicant for an air carrier operating certificate applies for certification through our flight standards field offices. Typically, informal meetings are held to inform the applicant of the requirements and procedures for certification and for the FAA to make initial assessments of the applicant's potential capabilities. The action which more formally begins the process is a "Pre-Application Statement of Intent" to start operations, which the applicant completes and provides to the FAA field office. This outlines, in general terms, the applicant's proposed scope and type of operations, type of equipment, areas of operations, and airports to be used, etc. Our field offices are instructed not to process this form unless it appears likely that the applicant will proceed toward full certification.

The next step is for the carrier to flesh out the details of its proposed enterprise by submitting a formal application. Accompanying the formal application, or to be followed shortly thereafter, are the carrier's proposed general operations, maintenance and training manuals along with checklists, Approved Airplane Flight Manuals, Minimum Equipment List, and other documents needed to evaluate its readiness to conduct air transportation in compliance with the regulations and safe operating practices. We evaluate such factors as whether the carrier has the capability to maintain aircraft in an airworthy condition, to properly train crewmembers, dispatchers and maintenance personnel, to safely turn around aircraft and crews from one flight to the next flight, and other pertinent parts of an air carrier operation. We also require that resumes of key management officials be submitted with the formal application.

As part of the formal application the new carrier would be required to submit an initial compliance statement, which lists all regulations appropriate to its proposed operations and how it intends to meet those regulations. Typically, the compliance statement cites appropriate provisions in its required manuals which spell out in detail how these functions will be carried out. FAA, of course, reviews this document to make sure that all pertinent regulations have been listed, and that the proposed means of compliance are adequate. The initial compliance statement provides an early review of how the applicant intends to conduct its operations as well as allows for changes as the certification process continues. A final compliance statement is provided later.

As these "paper" reviews are being conducted, we move into the next phase of our examination of the carrier--that is field inspections. FAA inspectors monitor the performance of such tasks as the training and checking of personnel and the inspection of proposed maintenance facilities. We examine the aircraft to be used to see if they meet certification and operational requirements. As this process evolves, we look at the proposed management personnel to see if they have the knowledge and experience needed to operate an airline. We also look at the compliance history of the people who will be involved in the management of the company.

At some point, usually in the later phases of the process, the carrier applicant would be required to submit to the FAA a plan for "proving flights" which, as the name suggests, are flights in which the applicant proves to FAA's satisfaction that it has the capability to actually run an airline in compliance with the regulations and safe operating practices. While a carrier may receive credit for ferry flights and FAA-observed training flights, it must also make plans to conduct flights which would be representative of their proposed operation, a dress rehearsal, so to speak. A carrier may request a reduction in the hours of proving flights required, based on the capabilities and past experience of its personnel. Despite any reduction which may be granted when FAA accepts the plan, the key factor is that the carrier must prove to the FAA's satisfaction, through the proving flights, that it can properly and safely run an airline. Thus, if the FAA discovers any deficiencies in the carrier applicant's procedures, that applicant will have to correct the problems and demonstrate that it has done so, even if this results in having to fly more hours of proving flights than called for in the plan. Likewise, if a carrier demonstrates its capabilities to FAA's satisfaction prior to the completion of the number of hours of proving flights called for by the plan, no further flights would be required. In short, the carrier applicant must demonstrate its ability to comply with the applicable regulations and the procedures and programs contained in its manuals irrespective of the number of hours of proving flights in its plan.

Once the plan for proving flights is accepted, FAA begins more intensive surveillance of the applicant. An emergency evacuation demonstration is conducted which tests the emergency equipment as well as the applicant's ability to maintain such equipment. The evacuation demonstration also verifies in a practical manner the quality of training given to the cockpit and cabin crewmembers on the use of the emergency equipment and the procedures to be used during an emergency evacuation. This capability can be demonstrated through a partial evacuation. During ferry or training flights, the applicant's maintenance programs, procedures, and capabilities are examined. The carrier applicant would be required to fly into a number of the airports that are representative of those it proposes to serve. During these flights, FAA inspectors examine the competence of flight crews, flight dispatchers, flight attendants, and ground personnel; the adequacy of maintenance programs and fueling procedures; and management's capabilities in the exercise of operational control. We also pose hypothetical problems for the crews and the company's operational control systems to see how they would react in unusual situations such as weather diversions and/or equipment failures. In essence, the proving flights are used by the FAA to verify that the carrier applicant can actually conduct its operations in accordance with the proposed methods and conditions set forth in its compliance statement.

After each proving flight, an FAA inspector briefs the applicant's management on any deficiencies detected during the flight or during ground operations, and the applicant must take action to correct these deficiencies. If they are major, the applicant must demonstrate the effectiveness of the corrective action by conducting additional flights. Once the FAA is satisfied that the carrier applicant's programs and systems adequately provide for compliance with the regulations and safe operating practices, the proving flights are terminated. Only after a successful demonstration by way of proving flights is an Air Carrier Operating Certificate granted to the carrier, along with operations specifications, which detail the conditions under which the carrier may operate.

The flight standards field office is required to prepare a certification report and forward it to the region which in turn forwards a copy to headquarters. The field office also notifies OST that we have granted the certificate. Once the carrier has obtained a certificate of public convenience and necessity from OST, the carrier may begin to operate.

Once a carrier has been certificated by the FAA, our involvement with that carrier does not stop. We exercise on-going oversight over the carrier to assure that it is in continuing compliance both with our safety regulations and its internal manuals and procedures which have been developed pursuant to our regulations. To do that, we employ a work force of aviation safety inspectors with expertise in aircraft operations, maintenance, and avionics. As a means of assuring that all operators are receiving appropriate levels of surveillance, we have established a comprehensive aviation inspection work program in headquarters requiring that our field inspectors conduct specified numbers of inspections, by type of inspections, of designated operators throughout the country. We also have established a program of in-depth inspections, using aviation safety inspectors from outside the normal jurisdiction which oversees a given carrier, to inspect all operators from top to bottom on a cyclical basis. We recently established an evaluation staff at headquarters which enables us to better analyze data developed during our field inspections to determine if trends are developing, and to more fully track changes which are occurring in industry so that we can adapt our practices to conform to them as needed. Further, we have been developing and implementing new and more comprehensive training and guidance materials for our inspectors to assist them in the performance of their surveillance efforts. In addition, we have been engaged in an extensive program of recruiting and hiring additional aviation safety inspectors to enable us to do a more effective job of surveillance. We believe strongly that these measures, along with a strong enforcement program, have contributed to an increased posture of safety compliance within the industry.

That concludes my prepared statement, Mr. Chairman. At this time, I would be pleased to elaborate on any aspects of our aviation safety programs you may wish or to respond to questions you may have concerning our approach to aviation safety.

Testimony
to the
Subcommittee on Nuclear Regulation
# of the
U.S. Senate
Environment and Public Works Committee

by

Robert K. Campbell
Chairman, President and Chief Executive Officer
Pennsylvania Power & Light Company

* * *

October 20, 1987

Good morning. I am Bob Campbell, chairman, president and chief executive officer of Pennsylvania Power & Light Company with our headquarters in Allentown, Pennsylvania. I am pleased to appear today before this subcommittee to present a perspective on the oversight of the nuclear power program in the United States and the necessary relationship and interactions between the industry and the NRC to support safe and efficient use of nuclear energy.

First, allow me to explain that Pennsylvania Power & Light holds an operating license and has operated the two Susquehanna power plants successfully for a combined total of over six years. Therefore, I believe that I am well qualified to describe from a utility executive view the successful relationship between the utilities and the NRC.

In addition, I am chairman of the Board of Directors of the Nuclear Management and Resources Council, an industry-wide organization representing all U.S. nuclear utilities and the major manufacturers and suppliers. NUMARC was formed to speak for the industry on regulatory matters before the NRC and other federal agencies.

To open the discussion, I'd like to remind the committee that nuclear power has been and continues to be a fundamental component in the United States' energy mix. Providing approximately 18% of our electricity, nuclear power is second only to coal in producing electricity. As of today, 108 nuclear power plants are on-line with 10 under construction. This represents a substantial investment by our nation in meeting our total electric generating requirements.

To ensure the continuance of nuclear power, the nuclear industry and the NRC share a common goal of safety. By law, the NRC is responsible for overseeing and assuring the safety of licensed nuclear plants. To fulfill its role, the NRC establishes rules and regulations, policies and regulatory guides, inspects and monitors nuclear activities, and takes enforcement action when the adequate level of safety established by the regulation is not met. It is the utilities, however, who have ultimate "hands-on" responsibility for the management and safe operation of their facilities. Although the roles of the NRC and the nuclear industry are significantly different, their common safety goal can be best achieved by working together in a cooperative and open relationship.

Allow me to be frank. The nuclear industry recognizes that no matter how well founded and successful the industry is, the NRC cannot and should not forego its public and statutory responsibility. It is in the industry's interest that the regulatory body and its processes are, and are perceived to be, effective and credible.

An objective of both the industry and the NRC for reaching this goal is improving the operational performance of our nuclear power plants. The industry recognized that all nuclear plants are affected by the performance at any one plant and have committed themselves to strive for operational excellence. Many self-improvement efforts have been initiated. The industry has gained confidence that greater plant safety and improved operational performance can be accomplished through the aggressive pursuit of self-improvement initiatives, and that higher safety standards and operational performance levels will be achieved sooner and more effectively than would be possible if operating practices were limited to just meeting regulatory requirements.

We, the industry, are convinced that if nuclear power is to continue as a viable energy option, the nuclear industry and the NRC, as well as Congress and the general public, must continue to develop a regulatory environment with the following elements:

- industry self-improvement initiatives;
- an effective and credible regulatory process; and
- an environment of mutual trust, confidence, and cooperation between the industry and the NRC.

Improved operational performance, and thus greater public health and safety, will result if Congress lends its support to the commitment already made by the industry and the NRC.

INDUSTRY SELF-IMPROVEMENT INITIATIVES

The TMI accident in 1979 brought into sharp focus the need for the industry to take prompt action to improve the safe and reliable operation of its nuclear power plants. Foremost among the industry actions taken after TMI was the formation of the Institute of Nuclear Power Operations (INPO) to assist nuclear utilities in improving the quality of its management and operations, and to assist the industry in its quest for operational excellence. Each individual member utility of INPO has the responsibility for the safe operation of its nuclear plant(s). INPO was not created to supplant the industry's responsibility nor the regulatory role of the NRC. It was established to provide the means whereby the industry itself could, acting collectively, make its nuclear operations safer through peer reviews and criteria based on excellence.

The industry is making great strides towards the commitment it made when it formed INPO. For example, the number of significant events per plant has substantially declined. The number of unplanned shutdowns, or "scrams," has decreased also. INPO's success during its first eight years of work in helping to achieve improved industry performance has been acknowledged by both the NRC and the industry. We're not perfect, for sure, but we are showing significant overall improvement.

A further self-improvement effort initiated by the industry was the establishment of the Nuclear Plant Reliability Data System (NPRDS). Starting in the mid-1970s, sections of the industry initiated a concept to record and maintain data on performance of plant equipment and systems. After TMI, both the industry and the NRC recognized the direct advantage of a well run and utilized system. In 1981, INPO established a formal Nuclear Plant Reliability Data System (NPRDS) in order to place industry-wide involvement in the program. By 1984, the NRC had formally recognized that INPO's established program should be relied upon by both the industry and the NRC. Presently, NPRDS supplies data on the performance of important nuclear plant systems and components. Utilities report design characteristics and performance data on the systems and components covered by NPRDS to a computerized data base. The data is used to solve plant problems and improve plant safety and reliability. NPRDS failure reports are tracked and analyzed to apply the lessons learned throughout the industry. The NRC has full access to this information and utilizes this data for analysis of plant operation and maintenance.

The industry has long been aware of the special role training plays in the operation of a nuclear plant. Formal training programs and simulators have always been the practice of the industry. The TMl accident certainly focussed our attention on the need to place rigid standards on this effort industry-wide. INPO took on this responsibility and began formalized training and accreditation programs with specific job and task analysis in the relevant areas at each nuclear plant. This awareness and intensive effort grew into an extensive, industry-wide effort to improve and sustain the training performance of all utilities. The formal National Academy for Nuclear Training was established in September 1985 to focus and take credit for the unified industry-wide efforts in the training of the industry's nuclear plant personnel. The Academy provides the framework for coordination of the various utility training programs. The industry recognizes that quality training is a key to achieving high standards of nuclear plant safety and reliability, and has taken the aggressive action needed to upgrade their training programs and training facilities.

The industry's commitment to excellence in training is clearly demonstrated by the actions taken and investments expended. Among them are:

- The installation of many specially designed, state-of-the-art training centers, located conveniently to the power plant. More than three times the amount of square feet dedicated exclusively to training is in use today than was utilized five years ago.

- The purchase of multi-million dollar control room training simulators -- an investment of around $10 million each. In 1979 there were 10 training simulators in the industry. Currently, 64 simulators are in operation and 15 are under construction or planned.

- An increase in the size of nuclear plant training staffs. In the mid-1970s, a typical training staff consisted of one coordinator and a handful of instructors. Today, an average of 32 instructors and 6 other professionals are working at each nuclear site in the country.

- An increase in the number of shifts for operation personnel. Today, virtually all nuclear plants have 5 or 6 operating shifts allowing one shift allocated for training or requalification at all times.

One of the most recent initiatives undertaken by the industry was the formation of the Nuclear Management and Resources Council (NUMARC). NUMARC was originally created in March of 1984 as an industry-wide initiative to address management- and people-related issues of concern to the industry and the NRC. The industry was apprehensive that new prescriptive NRC regulations in the area of personnel management would duplicate programs already established by the industry and undermine significant progress already made. NRC prescriptive regulations addressing management issues could set only adequate standards for the industry, not the standards of excellence to which the industry subscribes.

During the past three years in which NUMARC has worked within the industry and with the NRC to develop non-regulatory solutions to common problems, it became apparent that the issues confronting the industry and the NRC were being shaped by a new operational environment. The extensive construction program started by the industry has diminished. The industry and the NRC are now occupied in a nuclear power program with a focus that has shifted from design and construction to operational activities.

The nuclear industry recognized that it was important to have an organization representing a unified industry committed to exemplary performance. Thus, NUMARC's responsibility was expanded to represent the industry's position on generic regulatory issues on a broad front. The industry felt that NUMARC could best address a wide range of regulatory issues, is capable of exercising greater initiative, and can improve communications between the industry and the NRC.

This new NUMARC consists of one hundred percent of the nuclear utilities that are licensed to operate or construct a nuclear electric generating station in the U.S. The Board of Directors of NUMARC represent the senior management of the nuclear industry.

NUMARC has demonstrated a capability to effectively represent a unified industry on the regulatory issues it has addressed and has been recognized by the NRC as an improvement in the nuclear industry's response to regulatory issues.

NUMARC's long-term goals include:

o Improve the industry's effectiveness in developing and analyzing information on matters of concern to the industry and to the NRC;

o Improve the quality and constructive character of contributions made by the industry to the evolution of regulatory analyses and decisions;

- Enhance the resolution of problems between the NRC and the industry;
- Direct attention to and act upon regulatory issues the NRC considers important; and
- Initiate industry self-improvement efforts when deemed necessary.

A further statement on industry self-improvement initiatives needs to be directed to the Electric Power Research Institute (EPRI). Because of its size, diversity and importance to society, the electric power industry has a particular need for large-scale, cooperative research and development. Few individual utilities can afford to conduct their own R&D. As a result, utilities pooled their resources in 1973 to create EPRI.

One of America's largest private research organizations, EPRI is now supported through voluntary contributions by member utilities that provide about two-thirds of the nation's electricity. A substantial portion of EPRI's programs are directly related to nuclear power operations. The industry relies heavily upon EPRI for sound technical input in decisions involving both plant operation and regulation.

Thus, the nuclear power industry has proven its dedication to its commitment for operational excellence. It has shown that when a problem is identified as needing attention, the industry will initiate the necessary actions to resolve the issue. However, the industry's self-improvement initiatives are affected by the character of the public and regulatory environment.

AN EFFECTIVE AND CREDIBLE REGULATORY PROCESS

The nuclear industry recognizes that no matter how well founded and successful its self-improvement initiatives are, the NRC in accepting them cannot and should not forego its public and statutory responsibilities. Self-improvement, and the self-reliance it takes, does not mean the industry can act independently of the NRC's regulatory oversight. Nor, indeed, is it in the industry's interest or the public's interest to do so. Just as it serves the interest of sound regulators to have an industry that is technically competent and operationally proficient, it is in the industry's interest that the regulatory body and its processes are, and are perceived to be, effective and credible.

The NRC is responsible for overseeing and assuring the public health and safety. For sometime the focus of the nuclear power program in the U.S. has been turning to operational matters. NRC's attention has shifted to operational issues, and this shift has become more pronounced in recent years. Moreover, with the advent of some 108 operating units, it is not surprising that NRC resources are being redirected to what may now be called the operational phase of the U.S. nuclear power program.

The shift from construction to operations needs to bring about a correlating shift from a prescriptive regulatory process to a more performance-oriented approach in the operational phase that the U.S. nuclear power program has now entered and that will dominate nuclear power generation to the end of this century and beyond. The hard fact is that the operators of these licensed plants are in the best position to assure their safe and reliable functioning; regulation, no matter how competently and rigorously applied, cannot and should not assume this role. That reality should be a prominent factor in the shaping of regulatory policy affecting the quality of the industry/NRC interface. We see a positive response to that reality in the NRC's encouragement and support for the industry's self-improvement initiatives.

Foremost, the regulatory process must keep in mind the respective roles of regulator and regulated, set a constructive tone for the interaction in pursuing common safety objectives, and take into account the value of industry self-improvement initiatives. The Commission and the industry should set forth with clarity the reasons for, and the public health and safety benefits of, such an approach so it may be understood by Congress and the public at large. A resulting consequence would assure more uniform interpretation and administration of regulations within the regulatory environment.

To set regulatory requirements, Commission policy should place greater emphasis on performance objectives, rather than prescriptive details, and accord flexibility to licensees for meeting requirements through means that satisfy both safety and operational considerations. These are necessary elements in affording practical regulatory encouragement for greater licensee initiative. The Commission has received guidance from many sources supporting the concept that the NRC should be less prescriptive with regulation and thus more flexible in its methods to oversee the design, construction and operation of nuclear power. The Kemeny Commission, reporting to the NRC after TMI, stated that the NRC had a "preoccupation with regulations." Even Congress, through the appropriations language has stated:

> "The Committee is concerned that the NRC may inadvertently undermine the initiatives of the Institute of Nuclear Power Operations. The NRC should carefully review its activities in the area of reactor operations and training so as not to prevent the licensee from making the needed improvements."

The Commission should also provide regulatory incentives for the development and use of licensee and industrywide self-improvement initiatives. It should give policy recognition to the principle that industry self-improvement actions, when successfully implemented, constitute a proper basis for regulatory credit.

Where industry initiatives effectively address issues for which the Commission is considering the need for additional regulatory requirements, the NRC's approach should take into account those initiatives while maintaining the agency's oversight role. In instances where industry self-improvement initiatives adequately address NRC concerns, the Commission should encourage and recognize such initiatives by refraining from the issuance of duplicative NRC requirements. Such matters would necessarily be treated by the NRC on a case-by-case basis. Great progress has already been made in this direction as exemplified by experience to date with such nuclear industry self-improvement initiatives as training accreditation and the Nuclear Plant Reliability Data System (NPRDS).

Consistency and predictability are essential for a sound and effectively functioning regulatory system, to the realization of the self-improvement initiatives, and the necessary basis for public health and safety. The Commission should adopt measures that will assure agency-wide uniformity in implementing agreements reached with the industry. Measures should be adopted or reinforced by the NRC to assure consistency in application among the agency's regional offices and between those offices and NRC headquarters.

The industry and NRC have come a long way in the past seven plus years post TMI. The regulator has adapted to accept the desires of the regulated of self-improvement initiatives, and certainly the regulated continues to learn the advantages of self-improvement. Congress, the Administration and the public should lend its support in this direction.

INDUSTRY/NRC INTERFACE

Thus far, I have spoken of the self-improvement initiatives the nuclear industry has taken to accelerate industrywide achievement of exemplary performance in the management and operation of all nuclear power facilities. In addition, I have laid out the existing regulatory process and potential improvements to support NRC's proper review and oversight of operating nuclear plants in order to ensure the protection of the public health and safety. The final component of safety, I wish to discuss today, is communications or interface requirements between industry-initiated programs and NRC's regulatory efforts to enhance the safe operation of nuclear plants.

A nuclear industry that becomes demonstrably well-performing and has the capability to interact constructively with its regulators will create an environment that facilitates the fulfillment of the NRC's regulatory responsibilities for the public health and safety. While the industry must be prepared to mount its own initiative to achieve these objectives, the success of its efforts will be significantly affected by corresponding NRC attitudes and actions.

Although the roles of the NRC and the nuclear industry are significantly different, their common safety goal can best be achieved by working together. What is needed in the fulfillment of a strong, complementary interface component is a pervasive sense of trust between the nuclear industry and the NRC. Moreover, an "arms-length" relationship is the necessary ingredient between regulator and regulated. What has existed over the past decade or so is an industry/NRC relationship marked by adversarial confrontation. This relationship, in part, is a product of the trial-type licensing hearings conducted by the NRC where the formal and adversarial character of the hearings has influenced NRC interactions with the industry at all levels and aspects of the regulatory process. This relationship produces barriers to communications and collaboration between the two most knowledgeable repositories of nuclear operations safety expertise. This clearly works against the nuclear safety interests of both the industry and the NRC and disserves the broader public interest.

Today's regulations for nuclear energy in the United States is far different than the collaborative and mutually reinforcing regulations and relationships which mark major nuclear power programs in other countries of the free world. I should also point out that the technology used in those countries is virtually identical to the reactor designs developed and utilized in the U.S. today. We note, in this regard, the comparative description of the U.S. nuclear regulatory approach with that followed in six foreign countries whose nuclear regulatory programs, from a safety standpoint, have been as successful as ours but are far less contentious (Canada, the Federal Republic of Germany, France, Japan, Sweden, and the United Kingdom). In these foreign programs, more confidence and greater reliance is placed on the facility operator to assure the public health and safety; the regulatory body follows a markedly less prescriptive approach in setting safety requirements; and the relationship between regulator and regulated is characterized by collaboration in pursuing common safety aims.

The prescriptive nature of the U.S. nuclear regulatory process has been a major factor in creating an inefficient working interface -- one which encourages licensee dependence on NRC directives rather than licensee safety initiatives. As previously mentioned, the post-TMI Kemeny Commission was sharply critical of this state of affairs. The Commission's report warned that the existence of a vast body of regulations by the NRC tends to focus industry attention narrowly on the meeting of regulations, and may, in some instances, have served as a deterrent for utilities or their suppliers to take the initiative in proposing measures for improved safety. The NRC's later Rogovin Report voiced related concerns about the unintended disincentives to safety resulting from pressures on licensees and other affected components of the nuclear industry to rely upon compliance with prescriptive NRC requirements.

Effective communication between regulator and regulated is essential for mutual understanding and confidence -- and for a sound regulatory process. Thus, it is important that the Commission maintain NRC channels for interaction with representatives of the nuclear industry. Above all, Commission policy should encourage early communication, by regulator as well as regulated, to identify issues of mutual concern and to devise measures to address them.

SUMMARY

As I mentioned at the start, nuclear power is a fundamental component of the United States' energy mix and will continue to be for the foreseeable future. Only through NRC's responsibility for overseeing the safety of licensed power plants and the utilities having "hands-on" responsibility for the management and safe operation of these facilities, can their common goal of safety be realized. The industry has learned that greater safety and operational performance will be accomplished through coordinated, mutual self-improvement initiatives. NRC should be encouraged in its efforts to utilize industry initiatives when and where possible in order to take full account of the relationship between regulator and regulated. Finally, the NRC should be supported by Congress and the Administration in its shift in regulatory manner from the construction phase to the operational phase. A cooperative but "arms-length" relationship verses the traditional adversarial contact between the industry and the NRC will prove significantly more successful in the long term.

Again, it is clearly in the industry's interest that the NRC and its processes are, and are perceived to be, effective and credible.

The nuclear industry and the NRC have made tremendous strides, to date, in this direction. Much more work and effort is yet to be done. NRC and the nuclear industry look to Congress for support in this process. What is needed now is reassurance from Congress and the Administration to continue through this evolution. What is not needed at this time is a drastic and complex modification of the process. The evolutionary changes being made by both the industry and NRC should be encouraged. I am convinced that the public interest for improved plant performance and nuclear safety will be best served if the nuclear industry and the NRC work together -- cooperatively -- so that their efforts in pursuit of common objectives complement one another.

Testimony to

the Subcommittee on Nuclear Regulation
# of the U. S. Senate
Environment & Public Works Committee

by

William F. Conway
Group Vice President
Industry and Government Relations
Institute of Nuclear Power Operations
Atlanta, Georgia

on

October 20, 1987

Nuclear Industry Initiatives

Good morning. I am William F. Conway, group vice president for Industry and Government Relations at the Institute of Nuclear Power Operations--or INPO--located in Atlanta, Georgia. Two years ago, INPO briefed this Subcommittee on nuclear training program accreditation. I am pleased to appear again today to discuss nuclear industry self-improvement initiatives.

For the record today, I offer a brief overview of the Institute and its programs plus a discussion of some of the industry initiatives in safety and reliability with which we have been involved during the past eight years and examples of industry progress. Before discussing INPO's programs, however, I would like to stress that the public--or regulatory- interests and the nuclear industry's interests with regard to operational safety are mutually supportive. In our view, both have the same goal, but employ different methods in attaining that goal.

The Institute of Nuclear Power Operations

The Institute was formed as a result of the nuclear industry response to the accident at Three Mile Island (TMI) on March 28, 1979. A significant nuclear incident, TMI raised public anxiety about nuclear power safety and operation. It also brought about a healthy self-assessment on the part of the nuclear industry.

Review of the TMI event by the President's Commission on the Accident at Three Mile Island [the Kemeny Commission] and the industry's own analysis showed that Federal regulations existing at that time were in fact being met at TMI. Fundamentally, the industry's assessment of the accident concluded:

- that nuclear utilities were individually and collectively responsible for achieving higher standards in the construction and operation of their nuclear plants, and

- that in order to accomplish these goals, merely satisfying regulatory requirements was not enough.

Industry response to the event, independent of the regulatory process or Federal investigations, came quickly. Within two weeks, the Board of Directors of the Edison Electric Institute established a TMI Ad Hoc Nuclear Oversight Committee to coordinate the industry's response. By early summer 1979, that committee had announced the intent to establish the Institute.

In these efforts, U. S. nuclear utilities committed to self-improvement through cooperation, competition and peer pressure. As a result, INPO was officially established and was recognized by the Kemeny Commission in its October 30, 1979 report to the President.

INPO has had support from 100 percent of the nuclear utilities since its formation. There is no legal requirement for membership in the Institute, yet each utility that is constructing or operating a nuclear plant in the U. S. is--and has been--a member since early 1980. As a condition of INPO membership, these utilities voluntarily opened their operations to careful scrutiny by an independent, non-profit, non-governmental organization.

Today, INPO's constituency includes the 54 nuclear licensees in this country; utilities and utility organizations representing 13 countries outside of the United States; and, 14 major nuclear supplier organizations from the U. S., Canada and abroad. Together, the Institute's member and participant utility organizations represent 73 percent of the world's operating reactors.

The Institute's staff of 415 highly trained professionals has extensive nuclear industry operating and/or U.S. Navy nuclear experience. Our approach to qualification and training uniquely qualifies INPO for the task of promoting improvement in nuclear operations through assistance and cooperation. INPO's budget for 1987 is $48.5 million.

The Institute's technical programs are designed primarily to assist those who have the ultimate responsibility for nuclear plant operation in achieving the highest levels of safety and reliability. In short, nuclear industry management wanted help in establishing sound, prudent programs to improve overall performance.

For that reason, the INPO process includes evaluations, events analysis, information exchange, assistance, training accreditation and industry involvement to help the industry pursue superior safety and reliability. Before I describe initiatives that illustrate industry actions, I would like to briefly discuss the major INPO technical programs.

Evaluations

Evaluations conducted at both the plant and corporate level are one of the Institute's primary functions. These assessments are conducted by teams of approximately 15 nuclear professionals and augmented by industry peers.

They are a real-time assessment of a plant or utility's performance. Our aim is to focus management attention on areas where operations can be improved and to make management aware of good practices used by others in the industry. The constructive criticism provided by an evaluation is confidential and discussed only with the utility being evaluated. Improvements are achieved through cooperation, communication and occasionally through peer pressure, rather than specific rulemaking.

Event Analysis and Information Exchange

By sharing the benefits of operating experience, nuclear managers can solve operating problems at their plants using the knowledge of previous experiences at similar plants. One of the root causes of the severity of the TMI accident was poor intra-industry communication. For example, a sequence of events similar to the TMI event occurred at a similarly designed plant in Ohio 18 months earlier. In that earlier reactor event, however, operators were able to take compensating action in time to prevent an accident. Had the present industrywide information sharing capability been available, the operators at TMI may have been aware of that earlier incident and been able to react properly, thus avoiding the accident.

As a result, INPO has engaged in systematic gathering, review and analysis of nuclear plant operational experience since its inception. For example, 7,645 operational event reports were screened last year. From this extensive information, lessons are distilled and promulgated to the industry that allow personnel at individual plants to learn from the operating experience of the entire industry.

As ongoing follow-up, INPO evaluation teams assess a utility's use of both their own and industry operating experience to avoid recurring problems. These assessments indicate that more than 90 percent of required actions that stem from significant event report analysis have been completed industrywide.

Assistance

The Institute's assistance efforts range from on-site visits made at the request of a member to providing information on important subjects that can be used to enhance plant operations. INPO special assistance and technical exchange visits focus teams of experienced specialists on specific technical concerns or problems at nuclear plants, such as radiological protection, outage management, maintenance or training.

Training and Accreditation

Since the late 1970s, the U. S. nuclear industry has made dramatic improvements in training. These improvements are reflected by a six-fold increase in the number of plant-referenced training simulators; a five-fold increase in the amount of space dedicated to training; an eight-fold increase in the number of training professionals employed by utilities; and by the addition of one or more operating shifts, allowing one shift always to be dedicated to training and continuing training efforts. I will speak more to this later in my testimony.

The Institute supports training improvements in a number of ways, including:

- the publication of training and qualification guidelines,
- establishment of an industrywide data base, cataloging knowledge and skill requirements for key jobs,
- development of a model for effective, performance-based training,
- on-site training assistance, and
- a training program accreditation process.

A more in-depth discussion of accreditation and training initiatives follows my description of the Institute.

Industry Involvement

Typically, loaned employees from member utilities and liaison engineers from participant organizations represent about 10 to 15 percent of INPO's work force. This symbiotic relationship has been a key to our success over the years. The use of loaned industry personnel augments our staff and, along with industry peer evaluators, augment the evaluation, assistance and technical exchange teams. Industry personnel also provide INPO with a continual source of operationally experienced professionals. This program also enhances the return of operating experience and exchange of good practices to the industry.

In the interest of time, I have given you a brief description of the Institute. For reference, I have included the following material with my written testimony:

- Institutional Plan for the Institute of Nuclear Power Operations, a 1987 document describing INPO's organization, mission and activities in depth

- The Institute's 1986 Annual Report, that comments on the industry's progress in achieving higher standards of performance and provide a graphical presentation of results in the industrywide performance indicators.

- INPO's October 1, 1987 "UPDATE," that provides statistical highlights about the Institute's budget, staff and accomplishments

Earlier I mentioned that INPO achieves results largely through cooperation and communication. I would like to expand on that thought before I continue. The Institute's founders anticipated the need for authority among its members. INPO's Board of Directors has approved a policy that includes provisions that can ultimately lead to suspension of membership for failure of any utility to respond sufficiently to INPO recommendations. Such action would result in the utility's loss of credibility with its regulators and the public as well as potentially grave financial and insurance consequences.

While we have participated in very serious, high-level discussions with some members, we have not found it necessary to suspend a member. However, we know we have been able to effect positive change. The industry's performance progress as seen in the performance indicators contained in our 1986 Annual Report reflects this change.

The Institute interacts not only with utilities, but with government agencies. However, INPO was not created to supplant the regulatory role of the NRC, but to provide the means whereby the industry itself could strive for excellence in nuclear plant operations. In a broad sense, the ultimate goals of the NRC and the Institute are the same in that both strive to protect the public. We recognized early on that meeting our goals and objectives would require a proper working relationship with the NRC. At the same time, we recognized that the appearance of being either an extension of the NRC or an advocacy agent of the utilities would be detrimental.

For those reasons, a Memorandum of Agreement with the NRC, containing a number of supporting coordination plans, was developed and initially took effect on June 1, 1981. Through this working document, the Institute and the NRC conduct their respective activities and meet periodically to ensure that a clear understanding of this agreement is maintained.

We have also attempted to keep regulators abreast of our progress and initiatives. We have always encouraged utilities to share evaluation results with the NRC resident inspectors. And, as part of INPO's ongoing cooperation with the NRC, we meet periodically to share information on INPO activities, and NRC staff accompany INPO field teams during evaluation and accreditation visits.

Industry Initiatives

With that preamble, I would like to discuss two initiatives taken by the nuclear industry in an effort to achieve better performance and operations--training and maintenance.

The Nuclear Industry's Training Initiative

One of the recommendations of the Kemeny Commission concerned the establishment of accredited training institutions for operators and supervisors of operators. In his December 7, 1979 response to the Kemeny Commission recommendations, the President of the United States encouraged INPO, with the Department of Energy's assistance, to develop a program for upgrading and accrediting training.

The industry's initial assessment of the accident highlighted the crucial role of training in the safe and reliable operation of nuclear plants. In fact, the industry's efforts to develop an accreditation process began prior to issuance of the Kemeny Commission report. They were recognized in the NRC's NUREG 0585 issued in October 1979 ("TMI-2 Lessons Learned Task Force -

Final Report"). Efforts to implement an accreditation process for training programs, which was part of INPO's original charter, continued during the next two-and-a-half years.

To assist utilities in training program improvement and in meeting accreditation standards, detailed job and task analysis efforts were begun in 1981. These analyses were used to determine the knowledge, skills and abilities needed to perform key jobs at the nation's nuclear plants. This was the first step in a systematic approach to training. By 1982, a series of 15 training and qualification guidelines were completed, published and distributed within the utility industry. With this information and additional INPO assistance, the industry began developing performance-based training programs.

In 1982, the Institute reached a significant milestone in its training assistance efforts by issuing the objectives and criteria for accreditation of nuclear utility training (The Accreditation of Training in the Nuclear Power Industry 82-011). That document called for utilities with plants operating at that time to have nuclear plant training programs for 10 key operations, maintenance and technical positions ready for accreditation within four years.

Steps in attaining and maintaining program accreditation are:

- First, the utility conducts a self-evaluation to measure its training programs against the INPO-developed accreditation criteria. Weaknesses are identified and corrected. A subsequent self-evaluation report (SER) is reviewed for acceptance by INPO.

- Second, a joint INPO/industry team conducts an accreditation visit. The team evaluates the utility's training programs, verifies the self-evaluation report conclusions and prepares a report containing its independent recommendations. These recommendations must be satisfactorily resolved prior to actual accreditation.

- Third, an independent National Nuclear Accrediting Board undertakes a detailed review of the utility and INPO reports, conducts an in-depth interview session with utility management, and, during private deliberations, makes a decision on whether to accredit individual training programs.

- Finally, programs must be reviewed for maintenance of accreditation every four years. In part, the Institute uses the plant evaluation process to assess training program effectiveness and results. Rigorous follow-up is conducted on evaluation findings from earlier visits to ensure that corrective actions remain effective and that accreditation standards are maintained.

The National Nuclear Accrediting Board is the independent decision-making body that awards or defers accreditation of utility training programs. The Board is totally independent of INPO or other agencies in its deliberations and decision-making process.

The Board is structured to include four categories of membership: senior utility representatives, non-nuclear industry training experts, representatives from the post-secondary educational community, and individuals nominated by the U.S. Nuclear Regulatory Commission (NRC).

A working board of five individuals meets to consider accreditation for each nuclear plant's training programs. This working board includes one or more individuals from each of the classifications listed above but must have a majority of representatives from outside the nuclear utility industry. That provision was included to ensure that the Board is truly independent of the utility industry in the decision-making process and would have credibility with agencies external to the utility industry. A current list of members of that Board is attached for reference (attachment 1).

The accreditation program is routinely reviewed to maintain current training standards. The objectives and criteria that training programs must meet for accreditation were revised and reissued to the industry in January 1985.

A major milestone in the industrywide efforts to improve and sustain training performance came with establishment of the National Academy for Nuclear Training in September 1985. The Academy provides a nationwide framework for nuclear industry training improvements. A utility's membership in the National Academy is based on achieving accreditation for its training programs.

As a measure of progress, 485 training programs for 10 key operation, maintenance and technical positions had been accredited by October 1, 1987. These key positions include the following:

- non-licensed operator
- reactor operator,
- senior reactor operator/shift supervisor,
- shift technical advisor,
- electrical maintenance personnel,
- mechanical maintenance personnel,
- instrument and control technician,
- chemistry technician,
- radiological protection technician, and
- technical training for technical staff and managers.

Further, 19 utilities have become members and 67 plants have become branches of the National Academy for Nuclear Training since it was established in September 1985.

Since regulators are also interested in--and working on--training, the evolving accreditation process is watched carefully by the NRC and other government organizations. For example, early industry efforts were examined by and recognized in the Nuclear Safety and Oversight Committee's April 17, 1981 report to the President and in NRC's NUREG 0660.

The accreditation process was endorsed by the NRC staff on August 23, 1982 in SECY-82-354, "Accreditation of Training Programs in the Nuclear Power

Industry." The NRC and INPO coordination plan of April 5, 1983 recognized the industry's accreditation program, specified areas of information and knowledge sharing, and set forth methods for NRC review of INPO activities in accreditation.

As an assurance of quality, the NRC evaluates the effectiveness of the INPO accreditation program and the training effectiveness at individual sites. The NRC has been directly involved with the accreditation efforts in the following ways:

- o participated in 21 coordination meetings with INPO since March 1982,
- o observed 23 accreditation team visits at 22 sites since October 1983,
- o conducted post accreditation audits of training programs at eight sites since 1985, and
- o observed 31 National Nuclear Accrediting Board meetings since August 1983.

Throughout, we have sought to keep the Congress and the NRC abreast of this training improvement effort. For example, along with members of the National Nuclear Accrediting Board, we testified before this Subcommittee concerning the industry's accreditation process on June 27, 1985. Similarly, we discussed accreditation status during our June 19, 1986 testimony before the Senate Energy and Natural Resources Committee. And, we have discussed the accreditation status of the industry with the NRC Commissioners on four occasions during the past two years.

In our view, the U. S. nuclear utility industry has undertaken a substantial self-improvement program in training that involves a tremendous commitment of effort and resources.

Maintenance Initiatives

Because high-quality maintenance is essential in achieving excellence in overall plant performance, the Institute has focused on this important area since its beginning. However, beginning in 1983, the industry and the NRC recognized that additional effort was needed to enhance maintenance performance on an industrywide basis.

In early 1984, the Office of Nuclear Reactor Regulation (NRR) drafted the Maintenance and Surveillance Program Plan (MSPP). This document outlined maintenance improvements needed in the nuclear industry from the regulator's viewpoint. As a parallel effort, and in order to help address the NRC concerns, the industry asked INPO to analyze maintenance-related significant operating events in order to identify their root causes.

In January 1985, INPO completed its analysis of maintenance-related significant events from the period 1980 to 1984. This analysis identified the key areas needing improvement and provided a basis for further industry initiatives. The analysis also indicated that, in general, maintenance problems were not due to a need for additional programs, but rather that more effective implementation of programs was needed. At the same time, INPO with industry input began the development of maintenance-related indicators that could be used in monitoring maintenance activities.

In October 1985, the Institute published the "Guidelines for the Conduct of Maintenance at Nuclear Power Stations," to help member utilities implement programs to achieve a high level of performance in station maintenance. These guidelines, serve as the foundation of an on-going industry self-assessment effort covering 16 key areas for overall excellence in maintenance performance, ranging from the proper conduct of maintenance by craft personnel to the maintenance assessment activities of management.

In early 1986, four utilities conducted pilot self-assessments using the Institute's maintenance guidelines. These self-assessments were successful in identifying problem areas in sufficient detail to determine root causes and appropriate corrective actions.

The Institute also initiated the Maintenance Peer Evaluator Program in 1986. Similar to the Senior Reactor Operator (SRO) Peer Evaluator program used in plant evaluations since 1984, these maintenance peers added direct experience to the INPO evaluation process and helped spread industry operating experience. Since June 1986, more than 60 maintenance managers or supervisory-level personnel have participated in this program.

Further, enhanced INPO maintenance evaluations were begun in late 1986. Key to this effort was the development of an evaluation plan for each plant that focused on areas requiring more concentration based on plant performance. Based on industry and plant-specific performance, maintenance evaluators are emphasizing review of work control processes and interdepartmental coordination, post-maintenance testing, material condition, preventive maintenance and motor-operated valves as a part of this more focused approach.

In January 1987, INPO announced a major initiative to help accelerate improvements in industry maintenance performance. This initiative included the following:

- Each utility was asked to complete a self-assessment of its maintenance program by the end of 1987 using the INPO maintenance guidelines.

- Two special maintenance review and assistance teams were formed to directly assist utilities in improving maintenance performance. Composed of INPO evaluators, host utility managers, peer evaluators, representatives from the Electric Power Research Institute (EPRI) and nuclear steam supply system vendor employees, the teams work closely with plant and corporate management during a two week assist visit. The team helps determine causes of maintenance problems, recommends improvements and reviews the utility corrective action plans. The effectiveness of corrective actions are monitored during future INPO plant evaluations.

In March 1987, the Institute developed a list of the industry's key equipment problems. Based on evaluation experience and INPO's other key information systems and data bases, the list enables maintenance evaluators to focus attention on specific important equipment. For example, motor-operated valves continue to present problems for the industry. In response, an action plan for motor-operated valve improvement has been developed that will track industry valve performance, analyze elements of good motor-operated valve performance, and communicate lessons learned to the rest of the industry. Additionally, INPO maintenance evaluators are emphasizing motor-operated valve performance during evaluations.

Throughout, the NRC has been kept abreast of these maintenance initiatives conducted by the industry. This information exchange includes briefings with the NRC Commissioners and staff.

Industry Progress

Presently, 109 reactors are licensed to operate in this country and there are visible signs of industrywide progress in training, maintenance and performance. For example, the industrywide commitment to improving training quality since the late 1970s has produced the following:

- In 1986, U. S. nuclear utilities had more than 2.3 million square feet of space dedicated exclusively to training nuclear plant personnel--five times the amount of space in use seven years earlier.

- The number of computer-based, plant-referenced control room training simulators has increased six-fold, from 10 in 1979 to 64 in 1987. And, 15 additional multi-million dollar control room simulators are planned or under construction.

- A typical nuclear plant training staff consisted of one coordinator and a handful of instructors in the late 1970s. By the end of 1986, an average of 32 instructors and 16 additional training professionals were at work at each nuclear plant in the U. S.--eight times as many as in 1979.

- Most nuclear plants were staffed with four shifts of operating personnel in 1979, which left less than ample time for ongoing training or requalification. Today, most plants have six operating shifts, and the remainder have five; allowing one shift to be in training at all times.

Before I share some additional progress trends seen industrywide, let me briefly explain INPO's plant performance indicator program.

It is widely recognized that nuclear plants with high equivalent availability, small numbers of forced outages, few unplanned scrams, few significant events, and low personnel radiation exposures are generally well-managed overall. Such plants are more reliable and can be expected to have higher margins of safety.

Therefore, the performance indicator program and its use by U. S. utilities in establishing long-term goals directly supports improvements in plant safety and reliability.

Development of a performance monitoring program began in early 1981 at the request of utility chief executive officers in order to determine the ongoing level of plant performance and establish annual performance goals.

During the next three years, the Institute worked with groups from within and outside the industry on defining and establishing appropriate measures of nuclear plant performance. Ultimately, ten overall indicators were identified as good measures of nuclear power plant performance. Their definitions have found agreement not only in the United States, but internationally as well. The Institute's member utilities are now tracking their performance in these areas. INPO analyzes this performance data and provides feedback twice annually to members so they can monitor their performance as compared to the rest of the industry.

As the next logical step to the ongoing efforts to monitor performance, INPO worked with the U. S. utilities to establish long-term goals in each indicator area. By April 1986, each utility with operating nuclear plants in the United States had developed goals to be achieved by 1990 for many of the overall indicators.

Establishing these long-term goals defined an industry vision of desired achievement by 1990 and provided utility management with a framework for action. Clearly, the response of the utilities in regard to this effort is indicative of their commitment to long-term improvement.

The industry initiatives I have discussed are partially responsible for the progress seen in many of the overall performance indicators that follow. They also show where the U. S. industry is heading in terms of meeting the long-term goals, for example:

- Collective radiation exposure per boiling water reactor unit decreased from 1230 man-rem per unit year in 1980 to 622 in 1986, a decrease of more than 49 percent. The 1990 goal is 469 rem.

  For PWRs this figure dropped from 707 in 1981 to 397 in 1986, a decrease of about 44 percent. The 1990 goal is 288 rem.

- Unplanned automatic reactor scrams dropped by more than 47 percent between 1980 to 1986. The decline is expected to continue in 1987, with about a 25 percent decrease to less than 3 scrams per unit expected in 1986, which is good progress toward achieving the 1990 goal of 1.5 scrams per unit.

- Utility initiatives in worker safety have reduced lost-time accident rates at nuclear plants by about 71 percent between 1980 and 1986. This positive trend toward meeting the 1990 goal of 0.19 injuries per 200,000 man-hours worked is expected to continue in 1987.

- The number of safety system actuations per unit-year is expected to have declined by more than 30 percent by the end of 1987 down to 0.9 per unit-year from 1.3 per unit-year in 1985 when data collection on this indicator began. Should this projection hold, the industry will be very close to attaining the 1990 goal ahead of schedule.

- We have also seen positive trends in two other indicators. For example, the thermal performance of the nation's reactors has improved steadily since 1980. Reactor gross heat rate declined from 10,504 Btus/kWh in 1980 to 10,315 Btus/kWh in 1986. Based on mid-year statistics, it appears that the industry will make their 1990 goal for this indicator this year.

- Industrywide the volume of low-level solid radioactive waste has also declined since 1980. For boiling water reactors (BWRs) it dropped by more than 55 percent between 1980 and 1986. For pressurized water reactors (PWRs), the volume has decreased nearly 64 percent during the same period of time. Projections based on actual experience so far this year show that the industry may better the level of the 1990 goal for this indicator by year end.

- The graphs contained in our 1986 Annual Report also show that industrywide equivalent availability rose from 59.8 percent in 1980 to a high of 63.5 percent in 1985. Industrywide, however, equivalent availability declined in 1986 due to the number of plants in an extended outage status.

- The industrywide forced outage rate declined by more than 26 percent between 1982 and 1985. Again, because of extended outages by several plants, 1986's forced outage rate of 17.7 percent does not compare favorably. However, this indicator is expected to improve in 1987.

  If the seven U.S. nuclear plants that were in extended outages in 1986 and 1987 were excluded from the data base, the 1986 industry value for equivalent availability factor would be 66 percent and the forced outage rate would have been 10.2 percent. Each of these would have represented continued, significant industrywide improvement.

While progress for industrywide equivalent availability and forced outage rate has stalled for 18 months, the performance indicator trends taken in aggregate show generally that U.S. nuclear utilities are realizing their self-improvement potential. The operational goals that the U.S. utilities have set for 1990 are challenging, but can be achieved with the continued focused effort and commitment of the utility industry.

Conclusion

The foregoing discussion illustrates the sometimes parallel goals of the nuclear industry and regulators. In each case, the desired effect is being achieved through coordination and cooperation. More importantly, change is coming from within.

I would like to emphasize two factors that are vital to the Institute's success. These are:

- our independent posture
- and, our ability to hold certain interactions with an individual member as private.

We believe that the industry initiatives represented by INPO have had a positive effect on industrywide performance during the 1980s. Preservation of these two factors is necessary for INPO to continue to be effective.

The NRC and the Institute share the ultimate goal of protecting the public health and safety. By being non-governmental, however, INPO can promote excellence, while government organizations by their very nature are constrained to focus on statutory requirements. In our view, the drive to self-assess and improve from within is highly desirable. It leads to emulation and competition among utilities in the quest for excellence. It is the American way. It takes us beyond regulatory requirements in a very healthy and constructive manner. It is working!

Thank you for the opportunity to testify today.

-end-

Attachment 1

Members of the full National Nuclear Accrediting Board include the following:

Non-nuclear Industrial Training Category

John E. Carroll, Chairman
Vice President, Flight Standards and Training (retired)
United Airlines

Edward R. Jones, Ph.D.
Chief Human Factors Engineer (retired)
McDonnell Douglas Corporation

George E. Moore
Director, Education Department (retired)
Westinghouse Electric Corporation

Charles J. Sener
Assistant Vice President (retired)
Bell Communications Research, Inc.

Post-secondary Education Category

William R. Kimel, Ph.D.
Dean, College of Engineering
University of Missouri-Columbia

Russell R. O'Neill, Ph.D.
Dean Emeritus, Engineering and Applied Science
University of California, Los Angeles

John M. Palms, Ph.D.
Vice President for Academic Affairs
Emory University

Robert L. Seale, Ph.D.
Head, Department of Nuclear and Energy Engineering
University of Arizona

Utility Category

Robert L. Dick
Vice President, Construction and Maintenance Department
Duke Power Company

Carl Giesler
Vice President, Power Production (retired)
Wisconsin Public Service Company

Dennis E. Gilberts
Senior Vice President, Power Supply
Northern States Power Company

John M. Griffin
Senior Vice President of Generation, Transmission and Engineering
Arkansas Power & Light Company

Wayne H. Jens, Ph.D.
Vice President, Nuclear Operations (retired)
The Detroit Edison Company

Oliver D. Kingsley, Jr.
Vice President, Nuclear Operations
System Energy Resources, Inc.

Harold B. Ray
Vice President and Site Manager
Southern California Edison Company

Donald F. Schnell
Vice President, Nuclear
Union Electric Company

Gerald E. Vaughn
Vice President, Nuclear Operations
South Texas Project Electric Generating Station
Houston Lighting & Power Company

C. O. Woody
Group Vice President, Nuclear Energy
Florida Power & Light Company

NRC Nominee Category

Lincoln Clark, Jr.
Associate Director of Nuclear Reactor Laboratory and
Director of Reactor Operations
Massachusetts Institute of Technology

Frank C. Fogarty
Associate General Manager, Experimental Programs
EG&G Idaho Incorporated
Idaho National Engineering Laboratory

Forrest J. Remick, Ph.D.
Associate Vice President for Research
Pennsylvania State University

Gordon E. Robinson, Ph.D.
Professor, Nuclear Engineering
Pennsylvania State University

Testimony
to the
Subcommittee on Nuclear Regulation
# of the
U.S. Senate
Environment & Public Works Committee

by

Cordell Reed
Senior Vice President
Commonwealth Edison Company

* * * *

October 20, 1987

Good morning. My name is Cordell Reed. I am Senior Vice President of Nuclear Operations at Commonwealth Edison Company. I am pleased to be here today to discuss Commonwealth Edison's role in nuclear generation and how I support that effort.

First let me describe my background and experience in nuclear power plant technology and generation. I have a BSME degree from the University of Illinois. I have been employed by Commonwealth Edison Company (Edison or the Company) since graduation in 1960 and have held various technical positions, including seven years at several of the Company's coal-fired generating stations.

In 1967, I was assigned to Edison's Dresden Nuclear Station as a start-up engineer and received a Nuclear Regulatory Commission (NRC) license to supervise the operation of Dresden Units 1, 2 and 3. After three and one-half years of plant operations, I was named Project Engineer for the LaSalle County Nuclear Generating Plant, in the Nuclear Engineering Department at corporate headquarters. This position included responsibility for the plant's design, licensing, and engineering-construction interface during construction. For six years, I held various management positions in the Corporate Nuclear Engineering Department, including Section Engineer for all boiling water plants and Assistant Department Director. For two years, I was Manager of the Nuclear Engineering Department and supervised approximately 100 engineers. The Department was responsible for all of the engineering for Edison's six nuclear generating stations -- Zion, Dresden, Quad-Cities, LaSalle, Byron and Braidwood, or 12 units.

In 1977, I was appointed Assistant Vice President for Nuclear Licensing and Environmental Affairs. In that position, I was responsible for all of the Company's communications with the NRC. I was also responsible for all of the Company's environmental affairs activities, including a staff of thirty technical graduates in our Environmental Affairs Department.

In 1979, I was appointed Vice President of Nuclear Operations. In that position, I was responsible for the Company's five operating nuclear generating stations. In addition, I had authority over the Station Nuclear Engineering, Nuclear Fuel Services, Nuclear Training, Nuclear Licensing and Nuclear Services Departments. Approximately 3,300 people worked in my area, including approximately 750 engineers.

This year I was appointed Senior Vice President of Nuclear Operations, the position I currently hold. I have the same overall responsibilities and authorities that I had when I was Vice President.

I appreciate the opportunity to speak to you today and will candidly tell you that, as an officer responsible for the engineering and operation of Commonwealth Edison's nuclear generating facilities, testifying before a U.S. Senate Subcommittee is not an every day event for me. I am extremely flattered to be here and want you to know just how important I view this Subcommittee's activities regarding nuclear regulatory reform. As the largest nuclear utility in the United States, whatever legislation this Subcommittee proposes will have a profound effect upon Commonwealth Edison's future operations. I welcome this opportunity to tell you about our Company and of our commitment to operate our plants to the highest standards -- to standards of excellence.

Edison's current net nuclear capability, in service or ordered, consists of 13,727 megawatts. This represents nearly 12% of the total United States nuclear power generation.

The Company's construction program provides for placing three nuclear generating units (Byron Unit 2 and Braidwood Units 1 and 2) in service in 1987 and 1988. Byron Unit 2 was placed in service on April 11, 1987. Construction of Braidwood Unit 1 is complete and that unit is expected to be placed in service this month. Braidwood Unit 2 is expected to be placed in service by mid-1988.

Existing operating units include two at Dresden Station (our first nuclear station which became operational in 1960 with its now retired pioneering unit one), two at Zion Station, two at Quad-Cities Station, two at LaSalle County Station and two at Byron Station. As of December 31, 1986, Edison's investment in nuclear plants and equipment totalled approximately 7 billion dollars. When our construction program is completed, the total investment will be closer to 14 billion dollars.

Edison's Nuclear Operations employs nearly 4,400 individuals. More than 900 of these employees are technical graduates, including PhDs, nuclear engineers, radiochemists, and metallurgists, among others. This is an extremely competent group of highly-skilled and dedicated people. I am very proud of them all.

The Chairman of the Board of Directors, James J. O'Connor, is also strongly committed to and involved in the daily activities of the company's nuclear operations. I know -- his office is two doors down from mine and he is always dropping by with questions. He remains apprised of all events regarding nuclear operations even if it involves Saturday evening or Sunday morning interactions. A call from Jim O'Connor while he is on vacation to ask some penetrating question is a common occurrence. He has created the atmosphere of excellence which has permeated all of Edison's nuclear operations.

As Senior Vice President of Nuclear Operations, I report to the President of the Company, Bide L. Thomas, who in turn reports to the Chairman. I have two Vice Presidents reporting to me, one in charge of pressurized water reactor operations and the other in charge of boiling water reactor operations. There are also two Assistant Vice Presidents, one for Licensing and Plant Support Services and the other for Training, Fuel and Administrative Services.

Even though I have the utmost faith and trust in all of these highly competent and experienced executives, I still view the nuclear operations area as my responsibility. That is why normally on the third Saturday of the month you will find me making a visit to a station to observe the daily activities. I try to arrive around 2:00pm and remain until at least 9:00pm in order to experience two different shifts. I walk around and talk to the operators, technicians, and other workers. I discuss problems, policies, procedures and anything else that happens to be important to them. In this manner, I can really get a feel for what is going right and what is not going right at each station. After my visit, I prepare a report for the Station Manager which identifies existing or potential problems for him to resolve. I am not the only manager at Edison who performs such visits. People reporting directly to me and others, even Jim O'Connor, perform regular surprise visits.

Besides the fact that it is my job, I have another reason for my commitment to ensuring that Commonwealth Edison's nuclear stations are safely operated. I was born and raised in Chicago. I have spent my entire career -- 27 years -- at Commonwealth Edison. I live within 70 miles of several of Edison's nuclear stations. My family and friends are all in Chicago. My whole life is there. I have a real stake in my community and I want to make sure that it is a safe and secure place for everyone to enjoy the highest quality of life possible.

Commonwealth Edison has consistently maintained an overall commitment to safety and reliability in all operations. In fact, the mission of the Nuclear Operations Area is ". . . to generate electricity in a safe, efficient, and cost-effective manner in accordance with system dispatch requirements while achieving excellence in all phases of Nuclear Operations." This mission is adhered to not only by every engineer and control room operator but also by Edison's officers and directors.

A special committee of Edison's Board of Directors was designated in 1986 and assigned the responsibility for the oversight of the Company's nuclear operations. The Nuclear Operations Committee consists of three Directors, each serving a one-year term. The present Chairman of the Committee is Eugene P. Wilkinson, Vice Admiral, U.S. Navy, retired. The Vice Admiral was previously President and Chief Executive Officer of the Institute of Nuclear Power Operations (INPO), which is an independent, nonprofit organization dedicated to quality construction and excellence in the operation of nuclear power plants. The other two committee members are Dr. Thomas L. Martin, Jr., Dean Emeritus of the Illinois Institute of Technology and Dr. Edward A. Mason, Vice President - Research, of Amoco Corporation. Dr. Mason is former Chairman of the Nuclear Engineering Department of the Massachusetts Institute of Technology and was formerly on the Atomic Energy Commission.

The Committee was established to provide broad oversight for the Board of Directors in the area of nuclear operations, to help ensure the safe and reliable operation of the Company's nuclear units, and to help achieve and maintain high levels of material plant condition at all nuclear stations. This is to be accomplished through periodic reviews of the Nuclear Operations Area's Strategic Plan, its more significant goals and objectives, the achievement of those goals and objectives, and its performance as measured against key NRC, industry and Company performance indicators. These reviews are to be supplemented by periodic station visits for the purpose of viewing the facilities and meeting with top station management to discuss specific station programs and accomplishments.

In practice, the Nuclear Operations Committee meets every three months at one of Edison's nuclear stations to tour the facility with the Station Manager. The Station's activities and operations are thoroughly reviewed and subjected to tough questioning by the three Directors. In this way, they are able to effectively carry out their oversight responsibilities and report back to the Board of Directors.

I also report to the Board of Directors by making a monthly report, along with the appropriate Vice President, on any timely and significant issues regarding nuclear operations. These reports have involved topics such as NRC Systematic Assessment of Licensee Programs Reports and the recent INPO station and corporate evaluations.

Safe operations are further assured by Edison's internal oversight program. Two independent departments report directly to the Chairman and have authority over nuclear operations. The Manager of Nuclear Safety is the designated authority for examining, on a continuing basis, all nuclear safety related activities in the design, construction, operation and maintenance of the Company's nuclear power stations. As a part of this authority, the Manager of Nuclear Safety can order a unit shutdown or request any other action deemed necessary to avoid an unsafe station condition.

The Manager of Quality Assurance has the authority for monitoring nuclear station compliance with the Company's Quality Assurance Program. As a part of this authority, the Quality Assurance Manager can order a unit shutdown or request any other action deemed necessary to avoid an unsafe station condition. The Quality Assurance Department conducts surveillance and audits of Nuclear Operations Area activities related to design, procedures, construction, maintenance, modifications, and plant operating activities.

The corporate framework which embodies the Company's overall commitment to safety and reliability is the Strategic Plan for Excellence in Nuclear Operations. The Strategic Plan was created in order to integrate the goals and action plans of all departments within the Nuclear Operations Area to achieve excellence. The Plan establishes the mission, policies and objectives for the Nuclear Operations Area. It provides guidance on long range planning and sets specific expectations of performance for each department to achieve.

After the creation of the Mission Statement articulating the purpose of the Nuclear Operations organization, seven policies were developed which represent the overall operating philosophy for our organization. From these policies, twenty-four specific objectives were formulated which include all of industry's 1990 performance goals and other numerical objectives necessary to achieve our overall objective. The final, and perhaps the most important, part of the Strategic Plan is the action plan for achieving the objectives.

The seven policies developed to guide and channel the thinking, decisions and actions of management toward meeting the mission statement consist of the following:

1. Achieve excellence in nuclear activities.

2. In order to assure safe generation of nuclear power, each nuclear station will be:

    a. Operated and maintained in accordance with its NRC license, Technical Specifications, Corporate Quality Assurance Program, applicable Federal, State and local regulations, Company policies and procedures.

    b. Designed and modified in accordance with applicable codes, standards, regulations and the Corporate Quality Assurance Program to ensure operability, maintainability and reliability.

    c. Provide quality technical support in a timely manner.

3. Ensure a safe environment through implementation of Company industrial and radiation safety policies and procedures.

4. Ensure the health and safety of the public.

5. Ensure the availability and professional development of human resources to support safe and efficient generation.

6. Create and maintain a working environment for the development of motivated and productive employees.

7. Ensure that nuclear generation is efficient and cost effective.

The management of Commonwealth Edison Company believes it is not only important to be involved in the Company's nuclear activities but that it is equally important to be involved in industry-wide nuclear activities. As a result, both Chairman O'Connor and I are members of several organizations which we believe make significant contributions to the nuclear utility industry. Jim O'Connor is a Board member of INPO and the U.S. Committee on Energy Awareness, Chairman of the Nuclear Power Oversight Committee, and Vice Chairman and a Board member of the Edison Electric Institute.

I have been a registered Professional Engineer in the State of Illinois since 1965 and belong to various technical societies and organizations. I have attained the grade of "Fellow" of the American Nuclear Society. I was the first Chairman of the National Nuclear Accrediting Board for accrediting nuclear plant training programs at all nuclear utilities. I have been Chairman of the Steering Group for the Industry Degraded Core Rulemaking Program of the Atomic Industrial Forum for the last seven years. In addition, I am on the Executive Committee and Issues Management Committee of the Nuclear Management and Resources Council (NUMARC).

The safety and reliability of the Commonwealth Edison nuclear system is also assured by the oversight of several external organizations. The most prominent of the industry groups is INPO, which is staffed with both its own employees as well as utility employees loaned to INPO on a rotating basis. INPO teams have made station visits at each operating plant in the country at least once every 18 months since 1980. As a result, these teams have observed many excellent practices during their evaluations. Their reviews are performance based. For example, an INPO evaluator will monitor the control room activities of a nuclear station over 3 or 4 shifts, walking around with the operators and asking them questions. After a while, the evaluator melts into the background. This affords him the invaluable opportunity to observe control room operations as they normally occur. He is easily able to identify both good and bad practices and he evaluates them not based on minimum acceptable standards but rather on standards of excellence.

INPO evaluations culminate in formal exit interviews with corporate nuclear line management executives including the CEO and a report of problem areas as well as identification of good practices. The utility is then expected to respond to INPO's findings in writing and to correct any deficiencies prior to the subsequent evaluation. These reviews have proven to be valuable operating tools and set extremely high standards for the industry. We have discovered over the years that perhaps our toughest critics are our own industry watchdogs.

The most prominent of the external governmental organizations with oversight authority is, of course, the NRC. Since its inception, Commonwealth Edison has noticed a shift in emphasis of the NRC from a concern with engineering and construction issues to a concern over operation and maintenance. Whereas once the Agency had emphasized backfitting and hardware for a plant, now it emphasizes the conduct of the operators at the station and how they are performing their jobs.

This shift in emphasis can be demonstrated by an examination of the resident inspector program. When our LaSalle County Station was under construction, there was one resident inspector at the plant on a part-time basis. Today, while Braidwood Station is still in its construction phase, there are three resident inspectors permanently assigned to the station.

The same change in emphasis can be observed at our operating stations. In 1967 at Dresden Station, NRC inspections occurred during regular office hours. Today, there are at least two resident inspectors permanently assigned to each operating plant.

On the whole, the number and depth of inspections by both the NRC Region III office and NRC headquarters have significantly increased during the last five years. Correspondingly, the number of people and the number of hours involved with inspections and oversight activities of nuclear operations have greatly multiplied at Commonwealth Edison Company. While the amount of interface between Edison and the NRC has expanded, the working relationship with the NRC has maintained a high level of professionalism.

In addition, the American Nuclear Insurers (ANI), providers of liability insurance coverage, performs their own inspections at our reactors and would withdraw insurance coverage if ANI believes their shareholders are not adequately protected.

While it is beneficial to have independent authorities reviewing our actions, it is the utility management that has the ultimate responsibility, by law, to our customers and to the general public.

It is my opinion that Commonwealth Edison Company and the nuclear utility industry are following separate but complementary paths with the NRC. Many successes and some failures have resulted. One important success was the advent of NUMARC in 1984. Members of this industry-wide nuclear utility organization had previous experience with the NRC in the area of plant licensing. They got together in order to work on problems that the NRC was investigating and to find a solution that could be implemented in a timely fashion. The solution would then be volunteered to the NRC and undertaken by the utilities. Examples of such solutions can be found in the areas of training, operator requalification, access authorization, fitness-for-duty and maintenance.

This has been a win-win situation. It has been a win situation for the utilities in that the solution to the problem is developed by the people closest to the situation. On the other hand, it has been a win situation for the NRC because an acceptable solution is implemented more quickly through a voluntary effort than through the formal rulemaking process. The NRC provides direct oversight of these programs at each utility as part of their ongoing inspection programs to ensure their effectiveness. Furthermore, with the newly organized NUMARC we will see more of this type of interaction, with the utilities taking the lead in plant improvements while at the same time satisfying the concerns of the regulators.

There are certain areas which need to be revisited. One area that is particularly troublesome to Commonwealth Edison is the imposition of civil penalties. These fines have been greatly misunderstood by the public regarding the nature of the violation and the impact on their safety. A large degree of publicity has surrounded the announcement of these penalties which adversely affects the credibility and reliability of the utility. This is particularly true in the case of Commonwealth Edison which has more nuclear generating units than any other utility and consequently has a larger total amount of penalties than any other utility. This has thrown us into many adversarial proceedings which are counterproductive to the Company and to the industry as well. We look forward to working with the NRC and industry organizations to resolve this concern.

In conclusion, allow me to express my belief in the dual roles of Industry and the NRC.

The system of separate but complementary paths works -- and it works quite well. It has propelled the nuclear utility industry into a mode of striving for excellence in all areas of operation. With a bit of fine tuning and continued maintenance, this system will bring nuclear power generation to even greater levels of operation.

This system is not broken, though from time to time repairs are required. Now is not the time for major regulatory overhaul. Now is when Congress, the Administration and the public should recognize the value of nuclear power in our nation's energy mix and support the efforts by industry and NRC to ensure the continuation of this power source.

I want to thank the committee for the opportunity to speak today and am available for questions.

QUENTIN N. BURDICK, NORTH DAKOTA, CHAIRMAN
DANIEL PATRICK MOYNIHAN, NEW YORK
GEORGE J. MITCHELL, MAINE
MAX BAUCUS, MONTANA
FRANK R. LAUTENBERG, NEW JERSEY
JOHN B. BREAUX, LOUISIANA
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HARRY REID, NEVADA
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ROBERT T. STAFFORD, VERMONT
JOHN H. CHAFEE, RHODE ISLAND
ALAN K. SIMPSON, WYOMING
STEVE SYMMS, IDAHO
DAVE DURENBERGER, MINNESOTA
JOHN W. WARNER, VIRGINIA
LARRY PRESSLER, SOUTH DAKOTA
PETER D. PROWITT, STAFF DIRECTOR
BAILEY GUARD, MINORITY STAFF DIRECTOR

United States Senate
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
WASHINGTON, DC 20510-6175

February 10, 1988

Dear

The Subcommittee on Nuclear Regulation of the Committee on Environment and Public Works is completing its investigation and series of hearings on issues relating to the organization and operation of the Nuclear Regulatory Commission and on its relationship with the industry it regulates.

Now that the Subcommittee's hearings are complete, we would like to offer you this opportunity to provide whatever additional comments and material you believe are relevant or important to the Subcommittee's creating a complete record.

The Subcommittee intends to hold its hearing record open to allow you to provide additional comments relating to the issues which were the subject of our investigation and hearings.

If you wish to provide a response, please do so at your earliest convenience. Your cooperation throughout this process has been greatly appreciated.

Sincerely yours,

John Breaux

John Breaux
Chairman, Subcommittee on
Nuclear Regulation
Committee on Environment
and Public Works

The above letter was sent to various individuals; responses follow:

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

February 25, 1988

1988 FEB 30 AM 5:23

The Honorable John B. Breaux, Chairman
Subcommittee on Nuclear Regulation
Committee on Environment and Public Works
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Thank you for your letter of February 10, 1988 offering me the opportunity to provide additional comments to supplement the record in the matters under consideration by your Subcommittee. I have been pleased to participate in NRC's efforts to provide the Subcommittee information requested in connection with its investigations. My involvement in the Agency's overall effort to respond to the Subcommittee has been limited primarily to identifying and providing information on the fire protection topic.

I was contacted several times last summer by Mr. Jack Bagnulo, GAO, whom I understand was working with the Committee staff in gathering information relating to the fire protection matters of interest to your Subcommittee. In that context, I provided for the Subcommittee a comprehensive chronology of key events in the development of the fire protection issue, and an extensive listing of relevant (generic) fire protection documents, as well as copies of several specific documents from the listing that were requested by Mr. Bagnulo. More recently, I participated in developing responses to a number of specific questions relating to fire protection that were included in your January 27, 1988 letter to Chairman Zech.

Enclosed with this letter are copies of the most current versions of the fire protection chronology and the fire protection document listing which I prepared and provided earlier to Mr. Bagnulo. I believe that it is important that your Subcommittee consider fully the history and overall context (reflected in those two summary documents) in which NRC management decided in early 1984 to reexamine, and ultimately revise, existing fire protection guidance and (10 CFR 50 Appendix R) interpretations, in an honest attempt to deal with serious licensee confusion and expedite the implementation of Appendix R. I would also like to call the Subcommittee's attention specifically to entries in the enclosed documents (see my handwritten annotations) that indicate the degree to which public notification and the opportunity for public comment were included in the process followed by NRC in developing the new fire protection guidance and Appendix R interpretations approved by the Commission finally in early 1986. The outcome of that process may have proven controversial; but the process itself, I believe, was an open one.

In closing I would like to offer again, as I did in my conversations with Mr. Bagnulo last summer, to provide copies of any or all of the documents listed in the enclosures, or any others that the Subcommittee may identify, to assist in your consideration of these matters. My management at NRC is aware that I received your letter, and that I am responding directly to you. I was encouraged to do so, with no attempt to dictate and without requirement for management review of this response. If there are further questions regarding any of the above, I can be reached at the telephone number or mailing address given below.

Sincerely,

James H. Conran

James H. Conran

Enclosures:
1. Fire Protection Chronology
2. Listing of Generic Fire
   Protection Documents*

Address Mail To: U.S. Nuclear Regulatory Commission
ATTN: Mr. James H. Conran, AEOD
Mail Stop MNBB 3302
Washington, D.C. 20555

Telephone Number: (301) 492-9855 or (301) 492-4117

*Retained in committee files.

FIRE PROTECTION ISSUE CHRONOLOGY

3/22/75	Major fire occurs at Browns Ferry Nuclear Plant affecting a number of normal operating and safety systems.
2/21/76	NRC Special Review Group on Browns Ferry Fire issues report on incident (NUREG-0050). More than 50 recommendations for improvement of fire protection at nuclear power plants are made by the Review Group.
5/1/76	NRC staff issues new fire protection guidelines for nuclear power plants based on NUREG-0050 recommendations. Licensees are requested to compare fire protection features of their facilities to these guidelines.
	[A detailed listing of post-Browns Ferry fire protection guidance developed/issued by the NRC staff is provided in an attachment to this chronology.]
Early-1977	All licensees provide a Fire Protection Program Evaluation for their facilities identifying areas that do not conform to new NRC guidelines. NRC staff initiates effort to achieve full implementation of new guidelines by October 1980.
Early-1980	Most new fire protection guidelines have been implemented by most licensees; but several items remain outstanding and some licensees will not implement these remaining items voluntarily.
5/29/80	Commission issues proposed rule (IOCFR50.48 and Appendix R) to resolve remaining fire protection issues in operating reactors.
11/19/80	Commission issues final fire protection rule for operating reactors. This new rule backfits new requirements for protection of safe shutdown capability to all operating reactors, even those for which the NRC staff has already accepted alternative fire protection features in the fire protection reviews under the new post-Browns Ferry guidelines.

1/29/82	New fire protection rule is challenged in U.S. Court of Appeals by licensees belonging to Nuclear Utilities Fire Protection Group (NUFPG). Licensees contend that NRC did not indicate or explain the technical bases for new rule in noticing proposed fire protection rule revisions.
3/16/82	Court of Appeals narrowly upholds NRC on new fire protection rule, because rule includes explicitly a provision for licensees to request exemption from any aspect of the new rule upon showing that modifications required under the new rule would not enhance fire protection safety or that such modifications may be detrimental to overall facility safety.
7/5/83	NRC staff reports to Commission (in SECY-83-269) that, as of the end of May 1983, licensees have requested 588 exemptions from Appendix R requirements.
10/19/83	NRC staff issues Generic Letter 83-33 informing licensees that staff evaluations of exemption requests, and initial inspections at several facilities for compliance with Appendix R requirements, indicate serious problems with licensees' interpretation and implementation of Appendix R requirements.
11/15/83	General meeting in Bethesda, Md. of cognizant NRC program and regional office personnel responsible for fire protection implementation to discuss serious, widespread confusion among licensees regarding Appendix R interpretation. Decision is made to issue Information Notice and hold workshops in each region to address these problems.
12/19/83	Order imposing $50,000 fine for violations of Appendix R requirements at Trojan Plant is signed by Director of Inspection and Enforcement, NRC. Licensee's response to citations indicates that confusion regarding interpretation of Appendix R requirements is a major factor in the development of this situation. This action by NRC focuses strongly the utilities' concerns regarding the need for clarifications by NRC regarding Appendix R interpretations.
2/13/84	Information Notice 84-09 is issued by NRC staff informing licensees of non-compliance problems noted in initial Appendix R inspections, providing supplemental guidance regarding acceptable interpretations of Appendix R requirements,and advising of upcoming regional Appendix R workshops.

2/14-15/84 General meeting sponsored by NUFPG for all operating reactor utilities to discuss Appendix R interpretation difficulties, and to identify specific Appendix R issues and common areas of confusion among licensees that require clarification by NRC.

3/2/84 NUFPG submits formally to NRC staff "Questions Raised During The Nuclear Utility Fire Protection Seminar", for discussion with NRC staff at a meeting on 3/8/84.

3/6/84 NUFPG submits formally to NRC staff "Issues Which Are Not Clearly Addressed In The Fire Protection Rule", for discussion with the NRC staff at a meeting on 3/8/84.

3/8/84 NUFPG meets during the morning with cognizant NRC program office management, and during the afternoon with the Deputy Executive Director for Operations and members of his staff, to discuss Appendix R questions and interpretation issues raised in the 3/2/84 and 3/6/84 NUFPG submittals.

3/22/84 NRC staff provides to Commission for information a comprehensive new package of proposed guidance to assist operating reactor licensees in interpreting and implementing the requirements of Appendix R. The new guidance package addresses directly the questions and problems that have arisen in connection with Appendix R fire protection reviews and inspections to date (in particular, the extensive set of questions and issues identified and submitted by operating reactor utilities through NUFPG). The new guidance package is also distributed to all affected operating reactor licensees.

3/23/84 First of five NRC regional Appendix R workshops is held in Region III (Chicago, Ill area) to discuss new Appendix R guidance package. Similar workshops were held subsequently in each NRC region as follows:

Note: New fire protection guidance & App. R interpretations discussed in workshops →

Region V	(San Fransisco area)	4/5/84
Region I	(Philadelphia area)	4/18/84
Region IV	(Dallas area)	4/26/84
Region II	(Atlanta area)	5/4/84

(Notice of these meetings was sent by the NRC Regional Offices to all affected licensees/applicants, to cognizant state government officials and Local Public Document Rooms, and to a number of public interest groups, intervenors, and other interested members of the public, well in advance of the workshops, in accordance with standard NRC document distribution service lists.)

Note: App. R Workshops publicly noticed. by NRC. →

Documentation available if Subcommittee does not already have

5/2/84	Differing Professional Opinion submitted (co-signed) by five NRC program office and regional inspection staff, objecting to use of new Appendix R interpretations included in the new guidance package. The concern is expressed that the new interpretations will not permit timely or consistent resolutions of Appendix R deviations.
5/29/84	A member of the Office of General Counsel (OGC) staff expresses legal concerns regarding the new Appendix R interpretations in a memo to the Commissioners' Techhical Assistants.
5/30/84 Note: Open Commission Meeting →	Commission meeting to discuss technical concerns expressed in Differing Professional Opinion by staff engineers and regional inspectors, as well as legal concerns expressed by OGC staff member.
8/27/84	NRC Executive Director for Operations (EDO) initiates a comprehensive review of current fire protection issues by the Fire Protection Policy Steering Committee (FPPSC). The FPPSC was tasked to examine all current licensing, inspection, and technical fire protection issues, and to develop policy recommendations aimed at expediting Appendix R compliance for older plants and assuring consistent levels of fire protection safety at all plants.
10/2/84	FPPSC meets with headquarters and regional fire protection engineers to obtain their candid views on all current fire protection issues.
10/26/84	The FPPSC complete their review of current fire protection issues and report their findings to the EDO. The FPPSC support the proposed new Appendix R guidance package (with only minor changes) as the official agency position on all Appendix R interpretation issues covered therein. The FPPSC report is distributed to all cognizant program and regional office organizations for comment.
12/10/84 Note: Federal Register Notice published by NRC requesting public comment on FPPSC Report, which included, inter alia, new fire protection guidance and App. R interpretations. (See above for FPPSC charter) →	The NRC EDO identifies questions raised by internal comments on the FPPSC that need to be answered before proceeding to the Commission for decision on Appendix R issues. NRC staff is directed to release FPPSC report to PDR for comment by interested parties (see 50 FR 2056, dtd 1/15/85), and to prepare a Commission Paper on this matter taking into account the comments received.
1/15/85	NRC staff issues Generic Letter 85-01, transmitting FPPSC report to operating reactor licensees and requesting comment.

6/24/85	NRC staff completes fire protection Commission Paper, taking into account comments received on FPPSC report, and transmits to the EDO a comprehensive fire protection package for final consideration by the Commission.
7/24/85	The Committee for Review of Generic Requirements (CRGR) reviews the final fire protection package as requested by the EDO. The Committee concludes that the detailed guidance proposed by the NRC staff in the fire protection package can be usefully applied in facilitating the implementation of Appendix R, and recommends that it be sent forward for Commission consideration subject to several minor changes.
9/17/85	Commission Paper (SECY-85-306) containing final NRC staff recommendations on implementation of Appendix R is sent to the Commission.
10/3/85 Note: Open Commission Meeting	Commission meeting to discuss SECY-85-306. Current views of fire protection technical staff who submitted DPO are requested. (Current views were provided in memos dated 9/20/85, 10/25/85 and 11/14/85.) Several additional items requiring further attention or modification by NRC staff were also identified by the Commission. (These items were addressed subsequently by the staff in SECY-85-306A on 12/3/85, and in SECY-306B on 12/19/85.)
10/24/85	OGC provides to Commission a legal analysis of new Appendix R interpretations proposed by NRC staff in SECY-85-306. OGC concludes that all but one of the interpretations are legally correct and that legal concerns about another could be overcome by a strong technical safety argument supporting the new interruption. This resolves concerns expressed by OGC staff member in 5/29/84 memo to Commission.
11/27/85	Recommended resolution of technical staff DPO opposing new Appendix R interpretations is submitted to Director, NRR, in accordance with applicable NRC procedure (NRC Manual Chapter 4125). Finding of designated official is that the DPO fails to justify modification of the NRC management decision to develop new Appendix R interpretations and guidance to facilitate implementation of Appendix R.
3/7/86	Commission approves issuance of Generic Letter (GL-86-10) to licensees promulgating new Appendix R interpretations and guidance.

4/24/86	NRC staff issues Generic Letter 86-10, "Implementation of Fire Protection Requirements".
3/27/87	SECY-87-84 sent to Commission by NRC staff summarizing Appendix R inspection activities and escalated enforcement actions, and recommending final disposition of several long pending enforcement actions.

4956 Thornwood Trace
Acworth, GA 30101
March 7, 1988

The Honorable John Breaux
United States Senate
Committee on Environment and Pulic Works
Washington, DC 20510-6175

Dear Senator Breaux,

Thank you for your letter of February 10. It reached me on February 17. I appreciate the offer to provide additional perspective on the NRC's handling of the internal investigation of issues at Comanche Peak. My comments are attached.

Sincerely,

Eric H. Johnson

Eric H. Johnson

Comments of Eric H. Johnson with regard to OIA Investigation 86-10

The essence of OIA 86-10 is that an NRC inspector at Comanche Peak alleged that region IV managers harrassed and intimidated him to change or delete recommended enforcement actions on issues he had found in inspections. These allegations are false. This inspector is not typical of NRC inspectors. Before being assigned to Comanche Peak, he was a section chief supervising NRC personnel. He is supposed to be an experienced, mature individual who is familiar with NRC policies, supports them, is technically capable and who demostrates maturity and perspective in dealing with complicated issues. The NRC's own investigations and reviews of this matter show that he demonstrated little of these attributes. He passed draft inspection material to a licensee contractor contrary to agency policy, and he failed to follow the Commission's policy on handling differing views. More importantly, his technical judgement and perspective on facts he gathered was flawed. The NRC's own reports show these as fact. Yet it was the region IV managers who worked so hard to ensure that Comanche Peak inspection reports were accurate, that have suffered. Something is not right in such a process.

I left the NRC staff in July 1987. This should be placed in relation to the events of OIA investigation 86-10. OIA was directed by then Commissioner Asselstine to begin its investigation in March 1986. The investigation proceeded over the summer of 1986, and the investigative report was issued in November, 1986. The NRC appointed Guy Arlotto to head a group of experts in December 1986 to review the technical issues which were allegedly mishandled by region IV management. This group also reviewed the region IV inspection record at Comanche Peak. The Arlotto report was issued in March 1987. I left the NRC only after permitting what I believed to be an adequate interval for the NRC's internal process to work (i.e. to allow thoughtful review of the facts and permit conclusions which would clearly exonerate the region IV managers that were accused in this matter). In spite of the facts which demand that these managers be exonerated, the NRC has not yet taken this morally compelling step.

While the record that the committee has amassed on OIA 86-10 is comprehensive and speaks for itself, it is necessary to summarize some of the conclusions that have been reached along the way. As follows, they are:

- * The investigator in OIA 86-10 concluded that harrassment and intimidation of the NRC inspector at Comanche Peak, to alter or delete recommended enforcement actions resulting from inspections at Comanche Peak, could not be substantiated;

- * The report of the Arlotto group concluded that the technical issues in contention were properly assessed, categorized and handled by region IV management. Coincidentally, the technical judgement of the inspector was called into question in this report;

- * Finally, in anticipation of the invesigative efforts of your committee's staff, I beleive it will be clearly shown that region IV management carried out its responsibilities, that the NRC's internal investigation was fatally flawed, and the Commission's handling of this matter lacked some fundamental elements that should be expected of proper leadership - objectivity, decisiveness, and a sense of nuclear safety. I understand that the independent investigation conducted by David Williams also confirms this.

With regard to harrassment and intimidation, a workable definition as follows was developed by the Contention 5 panel in the Comanche Peak hearing. Harrassment occurs when someone is pressurred to do something that is wrong, and intimidation results when the person is compelled to commit the wrong act. As noted above, OIA 86-10 concluded that harrassment and intimidation did not occur. However, the investigator, George Mulley, subsequently testified to the opposite before the Glenn committee in April 1987. One can speculate at length as to his motives since it flies in the face of fact. More importantly, the results of the comprehensive review of the 34 issues performed by the Arlotto group clearly show that the inspector was not compelled to commit wrong deeds since the issues were properly handled. Indeed, management worked at length with the inspector to ensure the reports containing the results of his inspections were correct.

It is useful here to briefly discuss the responsibilities of both inspector and manager within the NRC's inspection and enforcement program. Inspectors gather facts. These facts are used by the inspector and his supervisor to arrive at assertions. From these assertions, NRC managers arrive at regulatory conclusions and take actions. This process is a continuum of inspector-manager involvement. At one end is the inspector in the field gathering facts. Manager involvement in this part of the process is limited principally to advice on leads to follow. At the other end is the ultimate regulatory action that will be taken by the NRC. The inspector is only one input to this decision. In between is a participatory process between supervisor/manager and inspector. The amount of inspector participation is largely a function of the inspector's maturity and judgement. Inspectors do not detemine by themselves NRC conclusions and enforcement actions resulting from inspection facts.

In the course of the OIA 86-10 affair, region IV management was criticized for failing to act on the differing view the inspector had with the way the 34 issues should have been handled. Region IV managers attempted responsible action but were thwarted by NRC management. For example, when it was clear that the inspector was not receptive to management direction concerning the disposition of the assertions he was raising, region IV established a peer process for reviewing the issues. Both Vince Noonan, the Nuclear Reactor Regulation project director for Comanche Peak, and Jim Partlow, of the Office of Inspection and Enforcement (IE), agreed to provide staff to this review committee. Before this process could be put into place, OIA 86-10 commenced, and region IV was ordered not to take any further action with regards to managing these matters.

Additionally, when region IV management became aware that allegations had been made with regards to its handling of inspection issues at Comanche Peak, vigorous steps were taken to define these issues. Memoranda were issued to the personnel involved, requesting that they describe the issues, and the actions that should be taken. Region IV management was directed by NRC management to withdraw these memoranda because of the on-going OIA investigation. When this happened, I recommended an alternative course to NRC management. In late March 1986, I recommended that the Commission form a panel of experts who could review each of the issues in question and could definitively decide on whether region IV management had acted properly on these issues. This would have decisively resolved the entire matter which has now dragged on for two years. NRC headquarters up to, and perhaps including, the Commission was unwilling to take this action

The Commission could have easily determined whether or not there was a safety issue at Comanche Peak that had not been handled properly. Instead an OIA investigation was ordered. The Commission was frozen by the charges of harrassment and intimidation and because there was an inherent assumption that safety issues were involved, they apparently abandoned all other efforts to resolve the matter. Region IV managers were judged guilty by NRC management, without the benefit of due process. Perhaps the Commission felt that the OIA investigation could determine the safety impact of the 34 issues, but OIA was not chartered to review them. In any event, technical issues should be reviewed by agency experts, not investigators.

The events clearly establish that the Commission did not have safety in mind during this investigation. The Arlotto group was not established until nearly nine months after the allegations were first made. Nine months during which alleged safety issues at Comanche Peak could have gone uncorrected. This is an unconsionable delay if the Commission thought, or even suspected that safety could be in question. That the Commission chose not to examine the 34 issues in March 1986, suggests that OIA 86-10 was a witch hunt. It served that purpose well. Competent and dedicated managers were damaged or destroyed.

Had the Commission caused an Arlotto review to be done when it was recommended in March 1986, the need for OIA 86-10 would have been avoided. It would have been possible to definitively determine that regional managers had carried out their reponsibilities. Quite clearly, if region IV managers had properly classified the issues and acted on them, then no harrassment or intimidation of an inspector had occurred. It is not harrassment or intimidation when proper regulatory conclusions are drawn from inspection facts. On the other hand, if the technical issues were mishandled, then safety concerns at Comanche Peak might have gone unaddressed and managers would have been deficient. The ultimate results show that this was not the case. One must wonder why the Commission failed to take more timely action so that the public could be assurred that they were carrying out their regulatory responsibilities properly.

The investigation did more than damage a few managers, it absorbed the time and energy of region IV. It diverted the attention of the region from important regulatory activities. During this period, one nuclear plant in region IV was in start-up, one was in power ascension, and one was in preoperational testing. Region IV continued to carry out its responsibilities for these plants without help from NRC headquarters, in the face of the enormous distractions caused by the unecessary investigation. Nuclear safety was clearly not served by the distractions caused by OIA 86-10.

Following the investigation, the Commission announced a reorganization and strengthening of the region to correct alleged problems in region IV. This announcement was made by Vic Stello, in a press conference, on my last day with the NRC staff in July 1987. My division was reorganized into two, and it was announced that twelve inspectors were to be added to region IV. Two additional SES and one section chief management overhead positions were added to the region. This additional overhead costs the taxpayers about $250,000 per year in added salaries (including additional secretaries). To date only four inspectors have been added to the regional staff. The remaining eight positions have been taken back by NRC headquarters. Like the idiot's tale, these promises were full of sound and fury, signifying nothing.

It is necessary to note that in June 1986, the responsibility for review of inspection reports originated by inspectors at Comanche Peak was passed to NRC headquarters (IE). This step was taken to remove region IV from management oversight of report preparation so that inspector-supervisor/manager interactions would be avoided. In spite of the absence of regional management in the review process, four major revisions were required, including the personal involvement of senior IE managers, to achieve a single acceptable report from the inspector in question in this matter. Similar to the experience of region IV management, IE management found that this inspector lacked perspective on the assertions and ultimate conclusions that should be drawn from inspection findings. This point clearly highlights the principal question at issue in this matter.

OIA investigation 86-10 was faulty. The investigator selected only those facts and interviewed only those he felt could help his case. He misrepresented himself to the staff, attempted a technical review although he told the staff that this was not part of his charter and that he was not qualified to do so. He held interviews in a manner designed to intimidate the investigation's targets. Finally, he had the audacity to represent a different view of the conclusions to another Senate committee. I believe sufficient material has been gathered by your committee to establish these as facts.

As noted earlier, the Commission failed to take decisive actions in March 1986 that would have resolved this entire matter then and there. Other errors in the NRC's collective judgement followed this. In December 1986, the Executive Director for Operations made the investigative summary public. The release was made without any comment, such as pointing out that harrassment and intimidation had not been substantiated. This silence permitted the press to wallow in sensational speculation. Region IV managers were not allowed to respond to the untrue stories that followed the report's release. Further, the Commission failed to take action on the release of draft inspection material to a licensee contractor, an action contrary to explicit Commission policy. In other circumstances, inspectors or managers who have violated this policy have been disciplined.

I hope that there will be useful lessons learned by the Commission from this matter. The Commission should, for example, keep safety in mind. In this case, it would quickly have become apparent, had the Commission focused on the alleged safety issues, that there was no safety problem and the entire controversy was merely a supervisor attempting to manage an otherwise unmanageable employee. The Commission must work very hard now to build bridges with the staff.

In conjunction with my remarks, I would like to make three recommendations. They are as follows:

(1) The Commission must never again allow a supervisor-employee management issue to get wrapped in a cloak of safety and harrassment. The Commission must ensure that safety questions are separated from personnel issues, perhaps using a peer review process. Safety questions can then be settled quickly and decisively, and permit personnel problems to be handled via traditional remedies.

(2) The Commission's internal investigative process should be drastically overhauled.

(3) The Commission should revise and strengthen the process for exposing and examining differing views on how issues should be handled and require adherence to this process.

I would like to mention one NRC manager who deserves special recognition. Throughout the entire affair, the region IV administrator, Robert Martin, supported me, and displayed personal courage and leadership. Without his leadership, the region could not have fulfilled its essential regulatory responsibilities while OIA 86-10 drained its energy. Mr. Martin is intelligent, thoughtful, and cares about safety. I fear that this matter has damaged his reputation and effectiveness within the NRC. If this is fact, this will be the biggest travesty arising from this matter.

In closing, I hope these remarks are of assistance to the Committee. I hope the Committee is able to use this information to help improve the regulatory process. In doing so, I hope that the Committee is able to determine why the Commission has left the inspector at Comanche Peak. The Arlotto group has found that the inspector's judgement on numerous issues was wrong. Safety is not served by leaving him in his job as the senior resident for construction at Comanche Peak.

March 1, 1988

1988 MAR -4 AM 7:11

The Honorable John Breaux
Chairman, Subcommittee on
Nuclear Regulation
Committee on Environment
and Public Works

Dear Senator Breaux,

I received your letter dated February 10, 1988 which stated that your Subcommittee would soon complete its investigation and hearings. It also solicited additional comments and material.

I gave my statement on the record during the investigation performed by the NRC Office of Inspector and Audit (OIA). On April 9, 1987, I subsequently testified before the Senate Committee on Governmental Affairs. I stand behind my statement and my testimony.

At this same Committee hearing and at your Subcommittee's hearing, the NRC Investigator, who investigated NRC Region IV, testified that the NRC Executive Director for Operations forced him to prematurely terminate the investigation and his supervisor, the Director of OIA, forced him to change his independent conclusions in the report and had others write the report. I do not see what can be added to the investigator's testimony as it speaks for itself.

I understand that bill S. 908 to create an Inspector General for the Nuclear Regulatory Commission overwhelmingly passed in the Senate. I believe this vote speaks for the need to establish checks and balances in the Nuclear Regulatory Commission. This could very well be the first step in reestablishing confidence in the Agency and the industry it regulates.

I appreciate your Subcommittee's examination of the issues. Although some indviduals (names provided to your staff) expected to be contacted and a more in depth investigation into their concerns, they understand that your Subcommittee has limited time and resources. All of those involved think that only an Inspector General can deal with the present concerns and prevent such problems in the future.

Sincerely Yours,

Harry Shannon Phillips, Sr.

Harry Shannon Phillips, Sr.
72 Rock Harbor
Granbury, TX 76048

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

March 14, 1988

The Honorable John Breaux, Chairman
Subcommittee on Nuclear Regulation
Committee on Environment and Public Works
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Your letter of February 10, 1988, offering the opportunity for me to provide whatever additional comments and material I believe are relevant or important to the Subcommittee creating a complete record is very much appreciated.

The comments in this letter are my own and do not represent official views of the U.S. Nuclear Regulatory Commission (NRC). My comments herein primarily address organization and operational issues relative to the Office of Inspector and Auditor (OIA), which functions as the agency's inspector general. These comments are made without the benefit of my review of the complete record and bank of information gathered by the Subcommittee to date in its investigation. Therefore, some of the comments may be redundant of other information already provided to or learned by the Subcommittee.

Generally, the concept of an inspector general (IG) is sound and well-intended. However, the premise of independence and autonomy upon which the concept is based has, in some quarters, too often been construed as being synonymous with the statutory as opposed to the nonstatutory IG. In my opinion, the most significant difference between the two is the method by which an IG can be removed from office. Taking this one step further, in theory, the crux of the issue of independence for an IG hinges ultimately on the authority to remove the IG, i.e., by the President for statutory IGs and by the head of the agency for nonstatutory IGs. I have not researched how many times either a statutory or nonstatutory IG has been removed from office but hazard a guess that it has not occurred more than a few times and not without publicity or Congressional interest being aroused. Although the provisions set forth in the Inspector General Act of 1978 guarantee that a statutory IG function cannot be abolished by the head of an agency, it is the accountability of the head of an agency to the Congress and the public which deters such action in agencies like the NRC having nonstatutory IGs.

In reality, the litmus test for the independence of an IG is his/her actions coupled with a state of mind, and independence is not the mystical aura attributed by some to the word statutory. During a hearing conducted by the Senate Select Committee on Intelligence on March 1, 1988, in regard to S. 1818, which proposed the creation of a statutory IG in the Central Intelligence Agency (CIA), both the IG for the Department of State and the Director of the CIA alluded to the fact that a statutory appointment does not ensure an IG's independence. Rather, it is an IG's actions and state of mind that ensure it. Surprisingly, the statutory IGs may choose to be rated on their performance by the head or deputy head of an agency like nonstatutory IGs. When this choice is made, statutory IGs then become eligible for salary bonuses recommended by a performance review board comprised of officials within the particular agency. This practice certainly detracts from the flawless image of the statutory IG envisioned in the minds of those who believe that statutory is tantamount to complete independence.

Unfortunately, the perception of the net worth of an IG and the degree of his/her integrity appear to be somewhat contingent upon the dollars recovered, prosecutions obtained and administrative sanctions imposed which are all reported to the Congress on a semi-annual basis by statutory IGs. This quid pro quo of dollars recovered and prosecutions obtained in exchange for the perception of integrity and net worth is reminiscent of the police officer subjected to a quota system which rewards him/her for issuing a certain number of traffic citations. This unwritten standard of measure applied across the board to the IG community is unrealistic because it does not take into consideration the size, budget and mission of the agencies having either statutory or nonstatutory IGs. Each agency has its own areas of concern. For example, the Department of Defense IG with approximately 1500 employees may place more emphasis on the contract process because of the large amount of dollars involved in their contracts whereas OIA with 29 employees may deal more with program areas in the NRC such as inspector performance. The results of the IG's efforts in each agency have a direct relationship to the size of the agency and its mission. These results for smaller agencies will not necessarily show large dollar recoveries, numerous prosecutions, etc., in the traditional sense of combatting fraud, waste and abuse. It is essential that the effectiveness of each inspector general be put in the proper perspective.

When relatively small inspector general functions such as OIA are placed under the Congressional microscope, I hope that case-specific issues which have been raised and focus primarily on individual professionalism or judgments are not distorted by magnification into larger issues of office integrity and independence. Based on my experience in OIA, I believe that there has been a continual improvement in professionalism accompanied by the proper attitude of doing what is right. To my knowledge, no OIA employees have been discouraged or prohibited from expressing in a professional manner what they believed to be right.

In final analysis, it is my belief that the creation of a statutory IG in the NRC would do no more than provide a perception of independence to those individuals who are predisposed to the notion that the statutory IG is a panacea for real or perceived problems in the regulation of the nuclear industry. The adage "If it ain't broke, don't fix it" seems to apply.

Lastly, I respect the evenhanded approach which you and your colleagues and staff on the Subcommittee are taking in these important matters.

Respectfully,

Mark E Resner

Mark E. Resner
Assistant to the Director
Office of Inspector and
Auditor

cc: Senator Alan K. Simpson
Chairman Lando W. Zech, Jr.
Commissioner Thomas M. Roberts
Commissioner Frederick M. Bernthal
Commissioner Kenneth M. Carr
Commissioner Kenneth C. Rogers
Sharon R. Connelly, OIA
John C. Bradburne, GPA

(1)

Statement

On this 16. day of .JUNE......,1988, I, Delmer E. Norman , freely make the following statement concerning knowledge that I possess regarding certain events that occurred at the Comanche Peak Nuclear Plant at Glen Rose, TX. This statement specifically pertains to allegations that Nuclear Regulatory Commission (NRC) inspectors or consultants who were pressured, harassed, and intimidated by NRC Region IV managers, supervisors, or senior lead inspectors of the Arlington, TX Office. The fundamental questions below concern whether I was contacted by various investigation teams and was asked direct questions about my knowledge of such pressure, harassment, or intimidation. The questions are answered by placing an "X" in the "Yes" or "No" space followed by a statement where appropriate.

1.a. Were you contacted by the NRC Office of Inspector and Auditor (OIA)?

Yes X.. or, No ... .

1.b. If yes, did the OIA Investigator ask if you were pressured, harassed, or intimidated?

Yes ... or, No ..X .

1.c. Were you pressured and harassed by NRC managers, supervisors, or lead inspectors concerning documenting adverse findings about the Comanche Peak Nuclear Project at Glen Rose, TX?

Yes X. or, No ... .
If the answer is yes, when and by whom were you pressured and harassed?

In late 1985 while assigned to CPSES I was pressured by Tom Westerman to change inspection findings in Report 85-05/07. These findings had been made in early to mid 1985 and discussed and approved by NRC management in charge of the CPSES project at that time. Westerman's actions were supported by the NRC Director of Reactor Projects, Eric Johnson. On one other occasion, during the same time period I was harassed by Ian Barnes, ~~lead~~ NRC Lead inspector at CPSES at that time. During my presentation of findings Barnes expressed disagreement, in full view of all present, by negative nodding of his head and other obvious facial expressions.

After spending over one year on the CPSES project I was reassigned as a region based inspector. On several occasions while on inspection trips I received calls from Region IV management requesting permission to sign for me on inspec-

CONTINUED ON NEXT SHEET

Ken 61388

CONTINUATION OF QUESTION I.C.

tion reports written by me. I was informed that Westerman, who was then my Branch Chief, had directed this action as a consequence of the CPSES disagreements. It was standard practice when no substantial changes had been made to draft reports for management, or other knowledgeable person to sign for the inspector during his absence. In no instance had substantial changes been made to the subject reports, and I considered Westerman's actions as harassment. To my knowledge no other inspector received this treatment.

Upon my return to Region II from CPSES rumors were circulating and continued to circulate for several months that Shannon Phillips, Darwin Hunter and I had gone to the newspapers, and to the intervenors concerning the CPSES problems. Also, to make matters worse management permitted other inspectors to read the OIA report after it had been released to management, supposedly in confidence. This report included very unfavorable statements about Phillips, Hunter and I which had been made by NRC management, plus our testimonies given to the OIA in confidence. During this time I perceived that most other inspectors considered it to be unwise to associate with Phillips, Hunter, and I. Also, during this same time period Barnes and Lee Ellershaw were in Washington to attend the wedding of another inspector

(3)

Ben 6-13-88

CONTINUATION OF QUESTION 1.C.

who had worked for Barnes in the Vendor Inspection Branch. It was reported to me by an acquaintance that Barnes and Ellershaw had been spreading the word around about how much trouble we were in; therefore, our names were being smeared in headquarters as well as in Region IV.

(4)

1.d. If you were contacted , did the investigator ask if you knew of other NRC inspectors or consultants who had been pressured, harassed, or intimidated?

Yes ... or, No X. . He did not ask.

1.e. If you contacted, were you asked questions about pressure, harassment, and intimidation while off the record. That is, the recorder or reporter taking notes did not record such questions while off the record.

Yes ... or, No X. .
If yes, did you tell the investigator about inspectors who was subjected to such treatment.

2. Were you contacted by the NRC Comanche Peak Report Review Group (CPRRG) that was headed by Mr. Arlotta of NRC Headquarters?

Yes ... or, No. X .
If the answer is yes did any CPRRG member ask you the same questions in paragraphs 1.b., 1.c. or 1.d above?

Yes ... or, No X. . I was never contacted by this Committee even though they were supposedly investigating "technical issues".

3. Were you contacted by members of either of the two Government Audit Office (GAO) Investigation Teams sent out by Senate or by David Williams, the supervisor of the GAO Team requested by NRC?

Yes ... or, No X. .

If the answer is yes were you asked questions 1.b., 1.c., or 1.d above?

Yes ... or, No ... .

4. Were you contacted by the CPRG or GAO Investigators to discuss the technical concerns that were the subject of the NRC Investigation Report 86-10?

Yes ... or, No X. .

(5) ~~(6)~~

5. Do you have indirect evidence or knowledge of pressure, harassment, and intimidation of NRC inspectors or consultants.

Yes .X or, No .... . If yes describe what evidence or knowledge.

I have both direct and indirect knowledge of such actions. I witnessed some of the actions against the Construction Senior Resident Inspector at CPSES (Shannon Phillips) and heard of other such actions by Tom Westerman and Eric Johnson. At the same time that I was being pressured to change inspection findings (Ref question 1.C) Phillips was undergoing even greater pressure since as the SRI and a member of management he had reviewed and supported findings made

CONTINUED ON NEXT PAGE

6. If you have other concerns or knowledge about the NRC breach of confidentiality promised to witnesses, threats of loss of job, loss of promotion opportunities, or retaliation that you or other witnesses suffered describe below.

I am especially concerned about the breach of confidentiality of my testimony to the OIA. I was contacted by the OIA during their investigation, and was promised that the testimony would be kept in confidence. However, my complete testimony was sent to Region IV management who permitted it to be read by other personnel in the region. In my opinion the testimony was held against me and ruined any chances of career advancement. Management also discriminated against me on several occasions

CONTINUED ON ~~NEXT~~ PAGE (7)

7~~8~~. Were you or do you have knowledge of any one who may have been intimidated because of any of the actions described in ~~7~~ 6. above?

Yes .X. or No ... If yes describe when , where and who was involved.

AS DISCUSSED ABOVE.

(6)

6-13-88

CONTINUATION OF QUESTION 5.

by several inspectors, as well as his own findings, during the period just prior to Westerman's assignment to the project. I also saw intimidating notes made by Eric Johnson on draft reports which had been written by Phillips. After being reassigned to the Region I heard reports that Bob Martin had attempted to remove Phillips from the SRI position

While at CPSES I became acquainted with two NRC Consultants, Tom Young and Joe McCloskey, who were assigned to work for Westerman, but also were performing some inspections under the supervision of Shannon Phillips. I was not directly involved in the work they were doing; however, I concluded from discussions overheard between the two and Phillips that they had identified findings and there had been disagreements concerning the findings with Westerman and Barnes. The findings were being defended by Phillips who had been involved in supervising the inspection activities of the two consultants. At the time several consultants were employed by the NRC, but only those two (to my recollection) had their contracts terminated by the NRC during that period. I had no first hand knowledge of the reasons for the terminations; however concluded from conversations between the consultants, Phillips, Westerman, and Barnes that Westerman and Barnes were unhappy with their work.

6-14-88

CONTINUATION OF QUESTION 6

in assignment of office space. The obvious discrimination by NRC management, which did not end with the newly staffed upper management, eventually led to my resignation from the NRC in March 1988. The following incidents are typical of management actions;

1. Members of the NRC inspection team at CPSES received cash awards in 1986. I had served on the team for greater than one year, but did not receive the group award.
2. Prior to joining the NRC in April 1982 I had received five or six significant awards (ie outstanding performance and quality salary increase) for my performance in other government agencies. During my six years with the NRC I received no awards even though my performance appraisals were always good, excellent for the past two years. Also one performance appraisal prior to the CPSES assignment stated that I was performing above my grade level and that I should be considered for a promotion at the first opportunity.
3. After returning to Region IV from CPSES I pointed out to management that my salary was from $8000 to $10,000 per year below that of other journeyman inspectors with comparable experience, and requested that a review be made of the "equal-pay-for-equal-work" practice of civil service as it concerned my situation. Nothing came from the request. During the

(8)

6-14-88

CONTINUATION OF QUESTION 6

recent RIV reorganization at least two GS-14 postions were created and filled by personnel outside RIV without being announced. I was given no opportunity to compete for the positions.

4. on at least three occasions, attempts were made, and carried out in one instance, to move me into two-man offices while inspectors with less senority (as defined in union contract) had private offices. In one instance while on an inspection trip I was contacted by the union Representative who informed me that I was to moved into a two-man office. Management supposedly informed him that I had been notified of the move. This move was stopped as a result of the call.

(9)

I have have freely given the above statement and it is true to the best of my knowledge.

Delmer E. Norman
Delmer E. Norman

LaDonna Brown
Signature of the Witness

I the undersigned Notary Public in the County of Tarrant, in the State of Texas, hereby certify that on this date the above witness signed the above statement before me.

This 16 day of June, 1988.

Millie Gnann
Notary Public

MILLIE GNANN, Notary Public
In and for the State of Texas
My Commission Expires 5-7-1991

On this 3rd day of June...,1988, AD I, Thomas Hilton Young, P.E., freely make the following statement concerning knowledge that I possess regarding certain events that occurred at the Comanche Peak Nuclear Plant at Glen Rose, TX. This statement specifically pertains to allegations that Nuclear Regulatory Commission (NRC) inspectors or consultants who were pressured, harassed, and intimidated by NRC Region IV managers, supervisors, or senior lead inspectors of the Arlington, TX Office. The fundamental questions below concern whether I was contacted by various investigation teams and was asked direct questions about my knowledge of such pressure, harassment, or intimidation. The questions are answered by placing an "X" in the "Yes" or "No" space followed by a statement where appropriate.

1.a. Were you contacted by the NRC Office of Inspector and Auditor (OIA)?

Yes X. or, No ... . George Malley

1.b. If yes, did the OIA Investigator ask if you were pressured, harassed, or intimidated?

Yes ... or, No .X.. He asked ~~if~~ (HtY) how things got pushed aside

1.c. Were you pressured and harassed by NRC managers, supervisors, or lead inspectors concerning documenting adverse findings about the Comanche Peak Nuclear Project at Glen Rose, TX?

Yes .X. or, No ... .

If the answer is yes, when and by whom were you pressured and harassed?

Like I stated in the OIA interview there were statements made even at the interview by ~~Heissman~~, in Washington D.C. Then at the site Ian Barnes wanted to drop the issue of our sample program as being invalid because we were not working on a controlled steady process. That is needed for Mil Std 105 D not the variety of personnel, equipment, and conditions like in welding, concrete pours, and installation at a power plant site. I brought that issue up the 1st week or two at the site. Pressure came from Barnes, Westerman and ~~Hale~~ to forget related cleanliness problems (relating to the specific ones we already were to recheck) and to drop the records and document control issues in Oct/Nov 85

1.d. If you were contacted , did the investigator ask if you knew of other NRC inspectors or consultants who had been pressured, harassed, or intimidated?

Yes ... or, No X . I told him Shannon Phillips was harassed and thought others were too

1.e. If you were being contacted, were you asked questions about pressure, harassment, and intimidation while off the record. That is, the recorder or reporter taking notes did not record such questions while off the record. Not to my recollections or by reviewing the transcript

Yes ... or, No X. .

If yes, did you tell the investigator about inspectors who was subjected to such treatment.

Consultants: Dave Brown - Registered P.E. Mech. ~Rhode Island (New England States) and John Gibson - Reg P.E. Elect - Seattle Wash should be interviewed also Al Johnson, area NRC Insp on Task Force in Elect when I started at Commanche Peak

2. Were you contacted by the NRC Comanche Peak Report Review Group (CPRRG) that was headed by Mr. Arlotta of NRC Headquarters?

Yes ... or, No. X . But they should have unless it was to be a whitewash.

If the answer is yes did any CPRRG member ask you the same questions in paragraphs 1.b., 1.c. or 1.d above?

Yes ... or, No ... .

3. Were you contacted by members of either of the two Government Audit Office (GAO) Investigation Teams sent out by Senate or by David Williams, the supervisor of the GAO Team requested by NRC?

Yes ... or, No X. . Myself and all the above mentioned people should be as a bare minimum

If the answer is yes were you asked questions 1.b., 1.c., or 1.d above?

Yes ... or, No ... .

4. Were you contacted by the CPRG or GAO Investigators to discuss the technical concerns that were the subject of the NRC Investigation Report 86-10?

Yes ... or, No X .

5. Do you have indirect evidence or knowledge of pressure, harassment, and intimidation of NRC inspectors or consultants.

Yes .X. or, No .... . If yes describe what evidence or knowledge.

John Gibson seemed pressured (based on a discussion I had with him) in the 1st couple months at Comanche Peak about a major grounding problem with major power equipment - it was not consistent with previous other sites. Westerman harassed Phillips for how to downgrade items. I heard either through a door or directly Westerman get on Shannon Phillips and Don Barnes get on Al Soben in meetings. Don Barnes expressed concern as being the scapegoat on the 5 Billion dollar Comm. Peak project.
Dana Brown expressed (on a canoe trip) some pressure - he left suddenly

6. If you have other concerns or knowledge about the NRC breach of confidentiality promised to witnesses, threats of loss of job, loss of promotion opportunities, or retaliation that you or other witnesses suffered describe below.

They (NRC) should state up front that confidentiality must be requested. My experiences indicate the NRC is instrumental in getting rid of / blackballing those that are educated, honest and dig for the truth. They do it directly or by sloppily handling names and information. They thereby oppose the very charge they have been given to perform. It happens to NRC personnel and consultants, utility people and contractors, vendors and consultants. Interview all the people who worked for P.A.C. Project Assistance Corp on site.

Re number 7 [illegible]

~~8.~~ 7 [illegible] Were you or do you have knowledge of any one who may have been intimidated because of any of the actions described in ~~7.~~ 6 [illegible] above?

Yes X. or No ... If yes describe when , where and who was involved.

I was blackballed and out of concern for two friends working at Comanche Peak when an allegation was to be given I told them they needed to request confidentiality. The one expressed concern over a new job if his name was used + this in Nov 85. Besides why tell the wolf how to get in the sheep shed?

I have have freely given the above statement and it is true to the best of my knowledge.

....
Signature of the Witness

Signature witnessed by Aubrey Young

I the undersigned Notary Public in the County of , in the State of , hereby certify that on this date the above witness signed the above statement before me.

This day of , 1988.

....
Notary Public

June 30, 1988

The Honorable John Breaux
Chairman, Subcommittee on
Nuclear Regulation
Committee on Environment
and Public Works

Dear Senator Breaux,

Your staff solicited additional comments and material concerning your Subcommittee's investigation and a series of issues relating to the organization and operation of the Nuclear Regulatory Commission (NRC). In addition, the relationship between the NRC and the industry it regulates was examined. I had a dicussion with your staff prior to and after the hearing and suggested how your staff or GAO investigators could investigate allegations about NRC Region IV (RIV) misconduct and mismanagement, as described in the attachments to NRC OIA Investigation Report 86-10. I recommended that your investigators talk to several inspectors who could confirm that several NRC inspectors and consultants were pressured, harassed, and intimidated by NRC RIV managers and supervisors who were more interested in promoting the licensing and assuring the operation of the plant rather than regulating the construction of the Comanche Peak nuclear plant.

The NRC inspectors and consultants were not contacted, therefore, those who directly or indirectly witnessed the misconduct were unable to give evidence to your Subcommittee. Until April 26, 1988, all of the witnesses assumed that they would be interviewed by the General Accounting Office (GAO), Office of Special Investigations, as other members of Congress and the NRC had requested this office to conduct a thorough investigation. The GAO investigators who worked for Mr. David C. Williams were responsible for this investigation. The names of witnesses who had knowledge of the RIV misconduct and mismanagement were provided to Williams' investigators but they did not not contact and interview the witnesses who could confirm the misconduct. In fact those who were interviewed thought that Mr. Houston, a GAO investigator, had already made up his mind in favor of NRC management before the witnesses were interviewed. The motivation for this behavior is still a question but it shows through in the GAO Report.

On April 26, 1988 the NRC inspectors and consultants read the headlines of the Dallas Times-Hearld which read: "GAO finds no proof that inspectors were harassed at Comanache Peak". At this time it became apparent that the GAO did not want to obtain the evidence that witnesses could provide. A subsequent review of the GAO Report (issued on April 22, 1988) signed by David C. Williams revealed an unobjective, and biased investigation that violates basic audit and investigation principles. The reaction of the witnesses was: how can the GAO report reach this conclusion when they purposely ignored the evidence that witnesses would have given? The GAO investigation and report is so fundamentally flawed that is not worth analyzing paragraph by paragraph. Also there is little profit in speculating why trained investigators chose to ignore these witnesses but talk to others to discredit the witnesses and Mr. Mulley, the OIA Investigator.

The NRC inspectors and consultants (witnesses) feel that from 1986 until the present evidence has been suppressed by Sharon Connelly, the NRC Director of OIA and she interfered with the investigation. It is also likely that Mr. Stello directed these actions. That is, on April 9, 1987 Mr. Mulley testified before Senator John Glenn's Committee that he was first pressured to terminate the investigation before it was completed and then his conclusions (that inspectors were pressured, harassed, and intimidated) were dropped from OIA Report 86-10.

The enclosed news article from the Washington Post dated June 2, 1988 describes how the OIA Investigator has since been harassed for telling the truth when he first testified before Congress. The GAO Report quotes Mulley's watered down testimony that subsequently occured before your Subcommittee and says it altered his contention that he was pressured and only was of the opinion that RIV inspectors were pressured, harassed, and intimidated. I know personally that Mulley was under intense pressure to the point he was harassed and intimidated and responded like this to save his career and preserve his sanity. Did the GAO investigators address this misconduct? No!

The "Post" also quotes Dick Denise as saying that the GAO misrepresented his testimony which was highly critical of NRC Region IV Office at Arlington, TX. It also quotes Denise as saying the GAO should have considered his comments in the context of a nervous man because such criticism could get him blackballed in the nuclear industry. If one reads Denise's testimony attached to the OIA Report there is no way to misinterpret this former RIV manager's inside and extremely critical look at how RIV pressured and harassed inspectors who threatened their cozy relationship with the industry they regulated. The GAO report obviously misinterpreted and ignored this evidence. It also ignored the testimony of Mr. Dorwin Hunter, a former RIV manager who made similar statements.

In December 1986 the NRC Comanche Peak Report Review Group (CPRRG) was formed to review only the technical issues in OIA Report 86-10. It used OIA 86-10 as the sole basis for their conclusions. This basis was flawed because the OIA 86-10 investigation was terminated before completion and management inserted their conclusion rather than the investigator's conclusion and changed the focus from misconduct to technical (outside the scope of OIA). Thus the central issue (misconduct) was not adequately addressed in OIA 86-10 and was not addressed at all by CPRRG. The scope of the CPRRG and the approach (a licensing approach to safety) as opposed to a field inspection approach (compliance to 10 CFR50 Appendix B QA requirements) assured that the CPRRG would find little safety significance in the issues in the OIA Report. The CPRRG review was principally conducted in Maryland by headquarters personnel, managers, and operations oriented inspectors instead of at the Texas site by field personnel and construction and QA inspectors. In other words the deck was stacked by NRC management from start to finish.

Those NRC Region IV managers and supervisors who condoned or were responsible for the misconduct have received awards, have been promoted, or remain in responsible positions while all of the principal NRC inspectors and consultants have been either fired, downgraded, or suffered career reprisals indirectly or directly. The GAO Report states that none of the principals had been subjected to reprisals but the Washington Post article states that reprisals were rampant in the RIV Office at Arlington, TX.

I know for a fact that the principals suffered reprisals and the GAO either did not interview witnesses or the investigators misrepresented what was said. The careers of the NRC managers, inspectors, and consultants, who testified against the RIV managers have been damaged beyond repair or ended because of the same RIV managers who supported or were involved with the misconduct. Now these same managers have brandished the defective GAO Report all around and told all that it exonerates Region IV managers involved with misconduct.

The witnesses are outraged that the GAO has ineptly investigated and made conclusions without gathering the evidence that was available by telephone or by mail. Also the GAO Report misrepresents what witnesses told the investigators. RIV misconduct not only occurred at Comanche Peak but also happened at Fort Saint Vrain (FSV). The FSV matter is still not investigated and reported by OIA almost 2 1/2 years after this safety concern was given to the OIA Investigator. As FSV preceded the problems at Comanche Peak, it was given as supporting example but the NRC has ignored it as a supporting example by handling it separately. This tactic is understandable as they do not want the two misconduct charges connected. The GAO investigators did not pursue whether the FSV inspectors were pressured, harassed, and intimidated by the same RIV managers.

The witnesses believe that after the excitement dies down no one is interested in learning the truth about what happened at Comanche Peak or other sites in RIV. Therefore, several witnesses have decided to take the initiative. They made sworn written statements that they witnessed instances where NRC inspectors and consultants were pressured, harassed, and intimidated by NRC RIV management and supervisors. These statements are evidence that it really happened. These statements are confidential and we believe that giving them to the NRC would only result in a breach of confidentiality and further harassment of the witnesses by the NRC who had every opprotunity to obtain this information. If it is given to anyone it must be an independent group who will reopen the whole matter and objectively interview and protect all RIV inspectors and consultants from retaliation.

We request that the Congress take the strongest action possible to clear this mess up. As a minimum, we believe the GAO Report should be retracted. We would also like to know why the GAO investigation was conducted in this manner when they are obviously capable of performing proper investigations. We make no charges against the GAO but the appearance of a conflict of interest is a possibility. Please acknowledge the receipt and action you intend to take.

Yours Truly,

James Sutton

James Sutton

Copies with Attachments
Honorable John Glenn
Honorable Morris K. Udall
Honorable John Dingell
Honorable J. Markey
Honorable Philip R. Sharp

JAMES W. SUTTON
26045 S. FOXGLENN DR.
SUN LAKES, AZ 85248

Statement

On this 20 day of MAY 1988......., 1988, I, JAmes W. Sutton. , freely make the following statement concerning knowledge that I possess regarding certain events that occurred at the Comanche Peak Nuclear Plant at Glen Rose, TX. This statement specifically pertains to allegations that Nuclear Regulatory Commission (NRC) inspectors or consultants who were pressured, harassed, and intimidated by NRC Region IV managers, supervisors, or senior lead inspectors of the Arlington, TX Office. The fundamental questions below concern whether I was contacted by various investigation teams and was asked direct questions about my knowledge of such pressure, harassment, or intimidation. The questions are answered by placing an "X" in the "Yes" or "No" space followed by a statement where appropriate.

1.a. Were you contacted by the NRC Office of Inspector and Auditor (OIA)?

[✓ Yes] ... or, No ... .

1.b. If yes, did the OIA Investigator ask if you were pressured, harassed, or intimidated?

Yes ... or, [✓ No] ... .

1.c. Were you pressured and harassed by NRC managers, supervisors, or lead inspectors concerning documenting adverse findings about the Comanche Peak Nuclear Project at Glen Rose, TX?

Yes ... or, [✓ No] ... .

If the answer is yes, when and by whom were you pressured and harassed?

1.d. If you were contacted , did the investigator ask if you knew of other NRC inspectors or consultants who had been pressured, harassed, or intimidated?

Yes ... or, [✓ No] ... .

1.e. If you contacted, were you asked questions about pressure, harassment, and intimidation while off the record. That is, the recorder or reporter taking notes did not record such questions while off the record.

Yes ... or, [✓ No] ... .
If yes, did you tell the investigator about inspectors who was subjected to such treatment.

2. Were you contacted by the NRC Comanche Peak Report Review Group (CPRRG) that was headed by Mr. Arlotta of NRC Headquarters?

Yes ... or, [✓ No] ... .
If the answer is yes did any CPRRG member ask you the same questions in paragraphs 1.b., 1.c. or 1.d above?

Yes ... or, No ... .

3. Were you contacted by members of either of the two Government Audit Office (GAO) Investigation Teams sent out by Senate or by David Williams, the supervisor of the GAO Team requested by NRC?

Yes ... or, [✓ No] ... .

If the answer is yes were you asked questions 1.b., 1.c., or 1.d above?

Yes ... or, No ... .

4. Were you contacted by the CPRG or GAO Investigators to discuss the technical concerns that were the subject of the NRC Investigation Report 86-10?

Yes ... or, [✓ No] ... .

5. Do you have indirect evidence or knowledge of pressure, harassment, and intimidation of NRC inspectors or consultants.

[✓ Yes ...] or, No .... . If yes describe what evidence or knowledge.

During my consulting work for Tugco/ERC I indirectly heard about and was told about things that were going on in the NRC Site off. As a former NRC inspector I had many Friends that were on Site doing inspections of all sorts - I personally believe that NRC inspectors / Consultants were being pushed and Harassed.

6. If you have other concerns or knowledge about the NRC breach of confidentiality promised to witnesses, threats of loss of job, loss of promotion opportunities, or retaliation that you or other witnesses suffered describe below.

During my Testimony given to the OIA investigator I was told that all my information would be Confidential - This was broken when the report Came out and my name was not blacked out - all Regions of the NRC received these Reports - I no longer had any confidence in the NRC's word.

8. Were you or do you have knowledge of any one who may have been intimidated because of any of the actions described in 7. above?

[✓ Yes ...] or No ... If yes describe when , where and who was involved.

In my estimation and indirect knowledge Both S. Phillips / Del Norman were being Pushed / harassed by NRC Site mgm.

I have have freely given the above statement and it is true to the best of my knowledge.

....
Signature of the Witness

I the undersigned Notary Public in the County of ,
in the State of , hereby certify that on this date the above witness signed the above statement before me.

This day of , 1988.

....
Notary Public

Dallas Times-Herald April 26, 1988

GAO finds no proof that inspectors were harassed at Comanche Peak

By Paula Yost
OF THE TIMES HERALD STAFF

The General Accounting Office said in a report Monday that it has found no proof that government officials harassed Comanche Peak inspectors into overlooking safety violations at the nuclear power plant.

The 18-page report, issued after a yearlong investigation, angered whistle-blowers and Comanche Peak opponents who charged that the GAO failed to interview plant inspectors and other witnesses with information about harassment by Nuclear Regulatory Commission officials.

H. Shannon Phillips, of Granbury, the senior inspector at Comanche Peak who made the harassment charges in March 1986, said Monday he stands by his allegations.

"I stick by what I said before, that I was pressured and harassed," he said.

The GAO's probe began in April 1987 after NRC investigator George Mulley accused his boss of altering, deleting and downgrading his internal investigation of Phillips' allegations.

The inquiry by the NRC Office of Inspector and Auditor and Mulley, assistant director of the OIA, produced a report containing claims from a dozen inspectors that they were pressured by supervisors in the NRC regional office in Arlington to alter their findings on safety problems.

Because of the charges, the OIA called into question the quality of construction of the $9.1 billion plant near Glen Rose, 80 miles southwest of Dallas.

But the GAO's report said, "In summary, we have concluded on the basis of our investigation that the evidence does not support the allegations . . ."

Phillips contends that the GAO never questioned people who could confirm that he was pressured and harassed. "If you don't talk to the people who can confirm it, how can you reach a conclusion?" he said.

Opponents of the nuclear plant expressed dismay and surprise by the GAO's findings.

"I'm just shocked," said Billie Garde, a Appleton, Wis., public interest attorney who represents Dallas-based Citizens for Sound Energy at Congressional hearings.

Garde termed the GAO's findings "unbelievable" because they ran counter to the detailed report produced by Mulley that contained a dozen allegations and "was the best documented report that I have ever read."

She said the GAO failed to contact parties who were harassed and witnesses of such incidents. "I don't know who they talked to or what they based their conclusion on. But I do know they didn't interview a lot of people who were involved in the case," she said.

The GAO questioned the process used by the OIA to conduct its internal probe into allegations of harassment.

While the GAO could find no evidence that Phillips was intimidated, it said Mulley failed to interview enough NRC supervisors at the Arlington office, and "unintentionally skewed the harassment question." The GAO also ruled it could find no proof that Mulley's findings were downgraded or deleted.

Mulley also complained that his report detailing interviews from NRC whistle-blowers was so widely distributed within the agency that supervisors were able to identify the people he interviewed, and their "cover was blown."

But the GAO did not fault the distribution of the report because "the commission authorized the distribution to assist in NRC management in addressing important matters such as health and safety issues requesting immediate action."

The GAO did agree with Mulley that the OIA tried to settle technical issues involved in safety disputes between inspectors rather than determining if the inspectors were harassed.

"The OIA lacked expertise to resolve such issues in a competent fashion," the report stated.

NRC Chairman Lando W. Zech, Jr., said Monday he was pleased "no evidence was developed to indicate that substantive changes were made in the Office of Inspector and Auditor investigative report on the Comanche Peak matter during the review and editing stage."

UNITED STATES
NUCLEAR REGULATORY COMMISSION
REGION IV
611 RYAN PLAZA DRIVE, SUITE 1000
ARLINGTON, TEXAS 76011

FEB 29 1988

STATEMENT OF T. F. WESTERMAN FOR THE RECORD REGARDING THE COMANCHE PEAK NRC OIA INVESTIGATION REPORT 86-10

I appreciate very much the opportunity extended by Senator Breaux in his letter of February 10, 1988, to place on the record comments related to NRC's Office of Inspector and Auditor (OIA) Investigation Report 86-10.

I sense that NRC management would like to put the whole issue of the Comanche Peak OIA 86-10 Investigation behind them and get on with the business of regulating the nuclear industry. I could agree with that, but only after there has been equal opportunity for presentation of the truth and facts regarding this case rather than the reaction to the apparent perceptions created without all the facts. I believe the treatment of Region IV has been unjust. All employees in Region IV have suffered.

The NRC OIA Investigation Report 86-10 was issued without any tempering caveats, before the Commission had drawn any conclusions, and without any opportunity for those targeted by the report to respond. The report appeared, in essence, to be a final judgment, particularly in the eyes of the media and the public. In the immediate reactive mode that followed the report, there was no opportunity for due process or further attempts to get at the truth or facts of the matter.

Until the testimony before the Senate Committee on Governmental Affairs on April 9, 1987, by Mr. Mulley and Mr. Phillips, I had remained silent, as had all of Region IV management, while waiting for the Comanche Peak Report Review Group's report (Arlotto Report) to be completed. Since only one side of the story was being told publicly, it became apparent that I could not wait for the NRC process to be completed. I found myself and Region IV being buried by the false perceptions created by others. I then commenced to initiate the memoranda identified at the end of this statement in an attempt to present the truth and facts that I felt were necessary for there to be due process in this matter. I have tried to identify the more important parts of these memoranda in my statement that follows. I have made reference to the Arlotto Report which was not previously available.

I do not believe that a fair and impartial investigation was conducted by the OIA Investigator, Mr. George Mulley. I believe the record of the investigation to date clearly illustrates its flaws:

- There was no recognition of regional management's responsibilities to assure an NRC inspection report represented a proper agency document. On page 87 of Mr. Phillips OIA 86-10 testimony, Mr. Mulley makes the following statement:

  > "I really don't see where he [Westerman] has the authority to alter or to modify a report that he's not ever signing."

  I was the line manager responsible for the Comanche Peak Inspection reports at the time. Reports that I as the line manager had the responsibility to assure represented a proper Agency document prior to issuance.

- There was no assessment of whether the issue should have been handled as a personnel/management issue.

- The Agency's process for differing professional opinions was ignored. The inspector involved went directly to a Commissioner, and bypassed regional and headquarters management.

- The investigator made no attempt to assess whether or not the inspector was performing in accordance with his performance elements and standards. Indeed the Arlotto Report later concluded (Appendix B, page 6) that "the inspector(s) presented poorly developed inspection findings and proposed inappropriate enforcement actions." The Arlotto Report also concluded (Appendix B, page 18) that "Finally, the OIA analysis and conclusions for Allegation I do not address the SRI's initial failure to develop the proposed violations along the lines of the 14 points in MC 0400."

- As the Arlotto Report (Appendix B, page 18) points out, "The demeanor of the investigators when interviewing the SRI's immediate supervisor [Mr. Westerman], particularly on the second day, was inconsistent with the approach taken when interviewing the SRI [Mr. Phillips]." I have termed the interviews of me as hostile, which is supported by the interview record. I commented on the intimidating and harassing demeanor of the investigators during the course of my OIA 86-10 interview (page 425).

- The OIA investigator, Mr. Mulley, undertook the review of the technical issues and the Region IV inspection program at Comanche Peak despite this being outside the capability of OIA. He misled Region IV management (Johnson, Westerman, and Barnes) when he repeatedly stated that there would be no review of the technical issues by OIA. Mr. Mulley stated on the record that OIA would not undertake the review of the Region IV Inspection Program at Comanche Peak and Mr. Goldberg stated on the record that OIA did not have the capability (Statements found on page 92 of my OIA 86-10 interview). Such misleading statements on the part of investigators went to the very essence on how certain questions were answered. Such tactics on the part of the investigators did not by their very nature lead to a full and impartial airing of the facts

- The technical review attempted was definitely inconsistent. The Arlotto Report concluded (Appendix B, page 18) that:

  > "The technical review by OIA was not consistent. The failure of the OIA technical investigator to interview the SRI [Mr. Phillips] regarding the technical issues, the general lack of technical focus in the interview of the SRI's prior branch chief, and the failure to interview the SRI's prior immediate supervisor tend to support this view. Further, the immediate supervisor [Mr. Westerman] was questioned at length on the technical issues at issue, and in more detail than the SRI [Mr. Phillips] (approximate length of testimony 700 pages for the immediate supervisor, 200 pages for the SRI [Mr. Phillips])"

- The investigator declined to interview previous supervisors with regard to the adequacy of Mr. Phillips' inspection findings. In one case, Phillips'former Section Chief, who was in the line concurrence and approval for one of the three inspection reports in question, was not interviewed.

- The investigator appears to have selectively narrowed the scope of his interviews to preclude testimony by others regarding the performance of Mr. Phillips. Yet, he freely interviewed a former NRC employee and Region IV Division Director with regard to his opinion of the performance of Region IV management, opinions the investigator appears to have made no attempt to substantiate.

I have found the whole process to be discriminatory. I would like to cite the following examples:

- An NRC Commissioner was apparently involved in the investigation from the outset. This included selecting the investigator, directing that all interviews be transcribed, directing the Director of OIA to provide him memoranda recording all phone calls to Region IV, and phone calls directly with allegers. Mr. Mulley made the statement to Eric Johnson that OIA was under continuing pressure from Commissioner Asselstine since OIA never knew if an alleger had first been to the Commissioner.

- Neither I nor other members of Region IV management were given equal opportunity to discuss the Comanche Peak issues with members of the Commission so that there could have been a proper initial impartial assessment.

- The involvement of Commissioner Asselstine in the investigation from the outset leaves in question the independence of OIA and the effect he may personally have had on the impartiality of the investigation.

- Throughout the investigation, comments were being made by the Government Accountability Project (GAP) to the NRC Comanche Peak Project Director that related directly to ongoing events associated with the investigation. GAP was obviously receiving inside information.

- I and other Region IV managers have been treated as guilty from the start, requiring us to prove our innocence beyond a shadow of doubt.

- My cash award for sustained superior performance was withheld after it had already been formally approved and I had received the signed award citation during a formal award ceremony. I am not aware of any NRC manager who has had their cash award or bonus withheld because they were the subject of an internal or external investigation. I still have not received my cash award.

- When Mr. Phillips was returned to his duties as a Senior Resident Inspector at Comanche Peak in April 1987, I remained on special detail to the Regional Administrator, having been removed from my position as a Branch Chief since December 1986, until June 1, 1987, waiting on the Commission to act.

- I have been required to take individualized one-on-one professional training in interpersonal relations, while it is my understanding that Mr. Phillips has not been required to take the same individualized one-on-one training.

- Mr. Phillips is still on site at Comanche Peak, in his same role, following up on issues that were in dispute and that were identified by the Arlotto Report to require further review. I would question the objectivity and independence of such a review by Mr. Phillips in view of the strong differences that existed.

I have provided detailed discussion on the NRC OIA Investigation Report 86-10 conclusions in my memoranda that are attached to this statement. However, there are certain matters I would like to emphasize regarding the investigator's "Conclusions" (of investigative facts) section of the OIA Investigation Report 86-10:

- The format of the conclusion section, with the allegation appearing in the conclusion, has caused many to read the restatement of the allegation as a conclusion. For example, the Arlotto Report, Appendix B, states: "1.7.11 The conclusion for Allegation I in OIA Report 86-10 states: Region IV Management Harassed and Intimidated Inspectors to Pressure them to Downgrade Proposed Inspection Findings at CPSES." Of course, the investigation Report which was signed and concurred in by the investigator, does not conclude that intimidation and harassment was substantiated. I can in no way even begin to estimate how many have misjudged Region IV management based on the format of the investigation report conclusion section alone. I do know, however, that this was a rather common mistake both within and outside the NRC.

- It would appear that the investigator has, in some cases, drawn conclusions that are not supported by fact or the documentation provided the investigator. One of the conclusions in the main body of the report I find to be false; i.e., the investigator stated that (OIA Investigation Report (IR) 86-10, page 37) "Based on the January 9, 1986, TUGCo memorandum, WESTERMAN deleted the proposed violation citing TUGCo's failure to document their audit from the inspection report." The documentation provided to OIA does not support this assertion. An audit did occur. Weeks before the January 9, 1986, TUGCo memorandum, the inspector (Mr. Phillips) in his own handwriting changed the issue to an unresolved item in draft 3a of the inspection report (A copy was provided the OIA Investigator). Also, weeks before the January 9, 1986, memorandum, draft 4a was typed on site in the inspector's (Mr. Phillips) trailer and was sent electronically to Region IV on December 23, 1985 (The date placed on the cover sheet transmitting the draft inspection report). The unresolved item was not included in draft 4a of the report. The inspector (Mr. Phillips) was requested in a handwritten note on the cover sheet of the report, draft 4a, to review and comment. No comments from the inspector (Mr. Phillips) were received. He subsequently concurred in and signed the final NRC Inspection Report. All of these documents were given to Mr. Mulley at the time I was interviewed.

I discovered the issue had been dropped for the first time in June 1986, three months after the issuance of the report in March 1986. Neither I nor Mr. Barnes (my group leader at Comanche Peak, who had assisted me in the review of this report) had noted the issue had been dropped. I can only presume that the inspector made the change. I believe it is clear that there is no basis for the investigator's conclusion of fact. It would be impossible to have used a January 9, 1987, TUGCo memorandum as a basis for deleting a violation that had first been changed to an unresolved item by the inspector in his own handwriting and then apparently dropped some time prior to December 23, 1985. Mr. Mulley's conclusion is therefore false and directly contrary to the documents provided the investigator.

- There are other conclusions that are inaccurate or unfounded such as the investigator's conclusion (OIA IR 86-10, page 37) that "Regional management [Westerman and Johnson] accepted this situation and took no action to address the inspector's disagreement." I have listed at least nine separate actions taken by regional management in response to the inspector's disagreements in my April 15, 1987, Memorandum to Sharon Connelly. Region IV's actions to pursue the situation were prematurely terminated by orders from NRC Headquarters.

- The investigator also concluded (OIA IR 86-10, page 37) that "WESTERMAN and JOHNSON were also aware that PHILLIPS and [name deleted] did not concur with changes made in inspection reports and signed the reports only because management wanted them to." In making this conclusion, the investigator completely ignores the chronology of events; i.e., the NRC inspection reports in question were already issued before Mr. Phillips' memorandum of April 4, 1986, in which he states that his concurrence only indicated that he was acknowledging management's right to make changes to the reports. In my over twenty five years professional experience in the nuclear industry, I have never had any doubt regarding the significance of my signature and concurrence on an official document. The fact the inspector felt compelled to write a memorandum is evidence he understood the significance of his concurrence which was already on the documents. It should not have been necessary for Region IV to issue a policy guide defining the significance of a professional's concurrence on an NRC inspection report. The investigator made no determination regarding the professional conduct of the inspector. For further discussion, see my memoranda attached to this statement.

- Statements made in Attachment MM of OIA Investigation Report 86-10 by the OIA technical investigator are also not correct. Recently I discovered that the OIA technical investigator had gone as far in Attachment MM as to state (Attachment MM, page 7) that "Both Mr. WESTERMAN and Mr. BARNES stated that the inspector rechecked the spool piece and found a marking on the spool piece that provided sufficient identification." A similar statement (OIA IR 86-10, page 9), attributed to me only, appears in the investigation report summary. Neither I nor Mr. Barnes made such a statement in our OIA 86-10 sworn testimony. On pages 152 and 153 of my OIA testimony I repeatedly stated "I don't recall" that the spool piece was not already marked. Mr. Barnes states on page 11 of his OIA Testimony that "As I recall, there was a mark number identified on the spool in question."

In further example, the OIA technical investigator concluded in Attachment MM (pages 7-8) that "The matter of finding a marking on the spool piece after the initial drafting [emphasis added] of these inspection reports and including it in the final report is an inspection policy issue and not a technical issue." The initial draft of the inspection report provided to OIA (Exhibit 4 to my OIA 86-10 sworn testimony) clearly states that the spool piece was marked with "spool piece number (3Q1) and the B&R drawing number." I termed this statement false and contrary to the documentation provided to OIA.

The OIA technical investigator states in Attachment MM (page 7) that the ASME Boiler and Pressure Vessel Code, Section III is not prescriptive with regard to traceability when the Code is indeed prescriptive. The OIA technical investigator further does not recognize that a spool piece is a piping subassembly. This is evident from his statement in Attachment MM (page 7) that "It is unclear whether the piping subassembly identification was a factor considered by the Region when accepting the spool number ..." The issued NRC inspection report (50-445/85-05;50-446/85-07, page 17) clearly states "The item had been marked with the spool piece number (3Q1) and the B&R drawing number which provided traceability to the material certifications." The OIA technical investigator failed to obtain a proper interpretation of the ASME Code which was the primary issue. The Arlotto Report concludes (Appendix B, page 56) that the inspector's interpretation of the code was improper and that "The markings on the subject piping spool piece (e.g. 3Q1) meets the ASME B&PV Code with respect to material identification."

Although the spool piece traceability issue is in no way a plant safety issue, it represents a classic mishandling by the OIA technical investigator in the statement of facts, technical review, and conclusion. My memoranda attached at the end of this statement discuss this issue further. OIA would certainly have been better served to have left the technical issues to those qualified to review such issues.

- With regard to the OIA conclusions concerning the handling and disposition of the technical issues, I refer to the Arlotto Report which concluded (page 4-1) that:

  "(1) None of the 34 issues identified in OIA Report 86-10 was found to be significant in terms of any direct adverse impact on plant safety.

  (2) Region IV's disposition, i.e., classification, of the identified issues was appropriate, and the Region acted within its authority based on the information contained in the inspection reports and on the guidance available for determining the classification of the findings, e.g., violation, unresolved [sic]. ---"

The sworn testimony of the two inspectors involved did not always appear to be forthright. In one instance, I have found that both inspectors maintained in their sworn testimony that they were shown a marking on a piping spool piece months after the inspection. In truth, it appears that the inspector(s) were made aware of the marking on the spool piece (spool piece number and drawing number) prior to the conclusion of the inspection on June 21, 1985. In fact, it was prior to the inspection exit on June 10, 1985, which had occurred some 11 days before the conclusion of the inspection. Based on information from a licensee representative, I was informed that there were discussions in the NRC Construction Resident Inspector's office on site with the NRC inspectors, prior to the exit meeting, regarding the marking already on the spool piece and the compliance of that marking with the ASME Code. The licensee representative indicated that they were surprised at the exit meeting when the NRC Inspectors stated that there was a violation.

There is further evidence that the inspectors were aware of the spool piece marking prior to the inspection exit meeting and that at least one had been shown the marking prior to the inspection exit meeting. In the inspector's input to the Arlotto Report (CPRRG-15, Enclosure 4, page 2), he states he had been shown the marking on the spool piece prior to the initial drafting of the inspection report (based on the regional secretaries log, the initial draft was turned into the region on July 17, 1985). He stated he had still written a violation in the initial draft of the inspection report, because he felt that marking in addition to spool piece number and drawing number were required. The violation cited in the initial draft and the violation the licensee documented by memorandum had been stated by the NRC Inspectors at the time of the inspection exit meeting are the same and in neither case were spool piece number or drawing number identified as part of that violation. Further the initial draft of the inspection report documents that the spool piece was marked. The OIA technical investigator overlooked this fact.

Mr. Phillips in his sworn OIA 86-10 sworn testimony (pages 109-110) states that "Lets say last of August and sometimes into September, they're finally coming up and saying, 'Hey, we do have a number on that." I believe Mr. Phillips' statement to be directly contrary to fact and truth. Mr. Phillips even goes on to say with regard to the NRC Inspector's reaction to finding the marking that "Well he was surprised. I don't know whether he was surprised because he thought maybe the number was added or he had overlooked it, which is possible. ... But it was dropped not because of inspection done during the period, but inspection that was done -- probably done during the inspection period in September."

This issue also appears to have been one of the examples OIA used in drawing the conclusion (OIA IR 86-10, page 37) that "WESTERMAN deleted proposed violations from draft inspection reports based on information received from the utility well after completion of the inspections." Such a conclusion is not supported by the facts.

In addition, the two inspectors were attempting to hold the licensee accountable for temporary markings required only during manufacturing/fabrication of the spool piece 4 to 5 years earlier. This same point was overlooked by the Arlotto Group and is very germane to final resolution of this issue. The Arlotto Report conclusion that a violation could have been written against the licensee's procedure is also not correct in that the markings were temporary by procedure and the markings are not required by ASME Code to be permanent. There has been no NRC management response to this issue. Further detail on this issue is contained in my memorandum I have requested be attached to the record at the end of this statement.

Mr. Phillips falsely "quotes" statements he said I had made throughout his own OIA 86-10 testimony (statements I never made nor were they substantiated by OIA). There were naturally no witnesses. I did find one case where there was another inspector involved. This occurred when Mr. Phillips claimed in his sworn OIA 86-10 testimony (pages 229-230), based on his conversation with the inspector, that I had stated there was no problem with the Comanche Peak containment electrical penetrations. He also made statements regarding my selection as a Branch Chief. The OIA Investigator, Mr. Mulley, was subsequently informed by the inspector that Mr. Phillips' statements in his sworn testimony were not accurate. I have a signed memorandum from the inspector, Mr. Wagner, stating that Mr. Phillips' sworn testimony is inaccurate. There was no action or followup by Mr. Mulley to either set the record straight or attempt to investigate the inaccurate sworn statements on the part of Mr. Phillips. My actions with regard to the Comanche Peak containment electrical penetrations (including a memorandum to IE Headquarters), the escalated enforcement action taken and the civil penalty issued by Region IV do not in any way support Mr. Phillips' assertions.

The OIA 86-10 sworn testimony of a utility consultant indicates that he was being shown draft inspection reports by certain NRC inspector(s). Such an act is directly contrary to official NRC policy. I believe it should be evident to the most casual observer that the consultant was hesitant in his testimony to either state which drafts or which inspector(s). I would like to quote from his OIA sworn testimony (Attachment GG, page 13):

> "Q [OIA Investigator] Which reports? Do you have any specific reports that you could reference that you feel have been --
>
> A [TUGCo Consultant] Well, some of them were draft reports and, you know, I -- don't want to -- I really don't want to say the ones, because -- that I have seen. You'd just have to take my word, I've seen certain reports.
>
> And it's not -- I don't think it's to me to go ahead and say which ones, they were drafts."

This consultant was also a former NRC employee and therefore familiar with the Agency's policy on drafts. As recent as January 1987, a Region IV Inspector was informed during a telephone conversation, with this same utility consultant, of information Mr. Phillips' had discussed with the consultant regarding an issue related to an inspection report that was not issued until March 1987.

I would like to comment on the Arlotto Report. It generally represents a very professional and well articulated report. There were many hours of hard work, and there are many valuable lessons to be learned from the report. The report does confirm that Region IV's handling and disposition of the issues was proper. I was somewhat disappointed that the report was issued without those involved being given the opportunity to be interviewed or to comment so that the report would represent the fully accurate and complete views of all involved. At least one trip to the site would have provided final closure to many issues that have been left to others to followup.

The Arlotto Report concludes with regard to Region IV management that the first-level supervisor should have better focused the inspector and that upper Regional management should have become involved earlier. With regard to the first-level supervisor issue, there were repeated attempts to "focus" the inspector by first-level supervision. There were also up to 22 other inspectors and/or consultants assigned to one first-level supervisor. The investigator (Mr. Mulley) indicated to a regional manager (Eric Johnson) that the inspector did not basically accept being supervised. With regard to the earlier involvement of upper management, there were a number of management actions that had or were being initiated by Region IV management. The most fundamental of these was to have been a peer group review of all subsequent inspection reports which raised issues upon which there was disagreement and a request for all individuals to identify all issues of disagreement so they could be addressed formally by regional management in an open forum for resolution. Since the OIA Investigator failed to recognize these actions, it is not surprising that the Arlotto group was not aware of Region IV's actions. Had Region IV management been allowed to proceed, I believe the Comanche Peak issues would have been resolved. I also do not believe that the Arlotto Group was aware that on April 9, 1986, NRC Headquarters directed the Regional Administrator for Region IV to terminate pursuing the Comanche Peak issues. All Region IV actions were terminated and therefore further involvement by Region IV management was precluded. Also at that point, the review of Region IV Comanche Peak inspection reports was assigned to IE Headquarters because the OIA investigation had been initiated. The IE Headquarters subsequent handling of Mr. Phillips' inspection reports was also a troubled, but not publicized scenario. The first report (50-445/86-08;50-446/86-06) took over 10 months to issue. Mr. Phillips at one point refused to sign the report after it had been through a number of revisions. There is a well documented history of the problems encountered by IE Headquarters in reviewing this report.

In another memorandum attached at the end of my statement, I have commented in detail on the testimony of Mr. Shannon Phillips before the Senate Committee on Governmental Affairs on April 9, 1987. I would like to emphasize the following comments:

> Mr. Phillips' prepared statement which he read into his testimony is very misleading to say the least. Over and over again, Mr. Phillips in his prepared statement has repeated statements he falsely attributed to me in his own OIA 86-10 sworn testimony; this gave the appearance that they were statements I had truly originated when I had not. He then used these false quotes as a basis for many of his statements which in reality represent only his opinions. In actual fact, I never made the statements nor did OIA substantiate that I ever made the statements attributed to me by Mr. Phillips. Such statements include:
>
>> I was there "to license the plant" (page 3)
>>
>> "Don't you make quite a bit of money, don't you..." (page 5)
>>
>> Region IV "would never forget" inspection report 84-32 (page 5)
>>
>> I was told by Westerman that it would be better if I found another job, outside of Region IV.(page 5)
>>
>>> (Comment - There were repeated statements from Mr. Phillips that he was leaving Region IV, and that he would have been better off to have gone to headquarters. I did (only once) respond to Mr. Phillips repeated statements, when I stated "you are probably right." This was an honest answer.)
>
> Mr. Phillips in his prepared statement (page 7) before the Senate committee states that "In May 1986 a consultant at Comanche Peak hired by the NRC came to me and complained that, among other things, Westerman had steered the consultant group away from quality assurance issues and that certain NRC inspections were deficient. I told him that he should talk to OIA. Soon thereafter I learned I was going to be removed from my job at the site for asking the NRC consultant

to provide information to OIA." This statement is directly contrary to the signed statement from the consultant (Exhibit 2 to my sworn OIA 86-10 Testimony) that I provided to OIA and to the Regional Administrator. The NRC consultant indicated in his signed statement that he had been approached by Mr. Phillips to talk to an agency "outside the NRC and has no direct connection to the NRC." Although Mr. Mulley maintains that Mr. Phillips was referring to OIA, there were other groups in the Dallas-Fort Worth area that are "outside the NRC." In addition, OIA is a part of the NRC and is certainly not "outside the NRC." The sworn OIA 86-10 testimony of this same consultant (Attachment CC to OIA Investigation Report 86-10, pages 9-10) is also directly contrary in context to the statement that "Mr. Westerman had steered the consultant group away from quality assurance issues." The NRC consultant stated in his sworn OIA 86-10 testimony in response to Mr. Mulley's questions regarding this issue, the following:

> "A. [By the NRC consultant] No. No as a matter of fact...They haven't tried to steer us in any direction that I know of.
> Q. [By the OIA Investigator] Okay. So, you've been allowed the freedom to look where you want to look or-
> A. [By the NRC consultant] Absolutely.
> Q. [By the OIA Investigator] - - - and report your findings without anybody trying to - - -
> A. [By the NRC consultant] Yes ..."

I have commented in detail on the testimony of Mr. Mulley before the Senate Committee on Governmental Affairs on April 9, 1987, in the memoranda attached at the end of my statement. I believe it is evident from Mr. Mulley's prepared statement, he read before the Senate Committee on Governmental Affairs, that he had prejudged Region IV. The responsibility of an investigative organization is to report the facts. Region IV was not given the opportunity to testify or defend itself at that hearing or any other public forum. I further believe he has made statements that are contrary to fact and truth. Examples include the following:

> His testimony with regard to intimidation and harassment of the inspector is directly contrary to statements he made (subsequent to the issuance of OIA Investigation Report 86-10) to at least 5 members of the NRC staff (including myself) that there was no intimidation and harassment.
>
> In his testimony (prepared statement, pages 4-5), he made accusations based on a telephone call between Regional management and OIA that Regional management

planned to remove Mr. Phillips from the site because he was assisting OIA in the conduct of the investigation. To the best of my knowledge, this accusation is not supported by the other parties involved in the telephone call, the memorandum written by the Director of OIA to document the context of the call or the Regional Administrator's notes of the call. There was evidence based on the written statement taken from an NRC consultant that he had been requested by Mr. Phillips to talk to somebody "outside the NRC."

Mr. Mulley maintained in his testimony (prepared statement, pages 6-8), that the Director of OIA removed quotations from the OIA 86-10 investigation because they were inflammatory and OIA could be criticized for taking things out of context. Mr. Mulley stated an example of this was the removal of explanations made by Mr. Westerman regarding being very tight on issuing violations, being absolutely correct, would create a lot of unnecessary paper work, and could lead to his credibility as a witness being questioned during the NRC hearings. All of these are explanations contained in the "Conclusions" to OIA 86-10, Allegation I. The Investigator did not appear knowledgeable with regard to his own investigation report conclusions.

In their testimony, Mr. Mulley (prepared statement, page 3) and Mr. Phillips (prepared statement, page 4) made accusations regarding the handling of NRC Inspection Report 50-445/85-07; 50-446/85-05 that are contrary to my OIA 86-10 sworn testimony and the normal field handling of inspection reports. I also believe it should be further evident to anybody reviewing the inspector's input (CPRRG-15) to the the Arlotto Report, that changes to the inspection reports stated in the Senate testimony of Mr. Mulley and Mr. Phillips, to not have been reviewed with the inspector, had been reviewed.

Mr. Mulley then quotes a statement in his Senate testimony (prepared statement, page 7) that had been made by Mr. Johnson (Former Region IV Division Director) and that had apparently been removed during editing of the investigation report. His quote of Mr. Johnson is completely out of context. Mr. Mulley claimed the statement made by Mr. Johnson reflected on a lax enforcement attitude. When in fact, Mr. Johnson was responding to a question regarding the documentation of inspection activities that had nothing to do with enforcement. Such a quote was right in line with the Director of OIA's statement that OIA could be criticized for taking things out of context.

I would briefly like to comment on a portion of Mr. Mulley's earlier testimony as compared to his later testimony before

Senator Breaux's subcommittee. Mr. Mulley in his April 9, 1987 testimony before the Senate Committee on Governmental Affairs stated that his original investigative conclusion (apparently without OIA management input) was:

> "The conclusions reached were that:
> (1) Region IV managers acted inappropriately to limit violations assessed at Comanche Peak; and that Phillips was harassed and intimidated by Region IV management in an effort to get him to downgrade or delete his inspection findings."

During Mr. Mulley's October 8, 1987, testimony before Senator Breaux's subcommittee, he states:

> "I think in certain areas, for example the technical issues, I felt that we were overemphasizing the technical issues especially when I myself--and OIA as a whole--didn't really have the expertise to make any real hard-line calls. I was more interested in how the inspector was being handled out at Region IV and Comanche Peak, and not as concerned about the technical validity of his findings. To me, there was really no excuse if, in fact, as alleged, an inspector was being harassed and intimidated over inspection findings, whether or not at the bottom line he was right or wrong in his inspection findings--there was no excuse for anybody to harass and intimidate in the NRC.
>
> -- -- --
>
> Yes, sir. When I put together my report and I went through the testimonial evidence and what I had gathered, it was my belief that the inspector had been harassed by management as a result of his inspection findings"

I find Mr. Mulley's testimony to be conflicting and offensive. I would like to make the following observations:

- He had originally judged that Region IV managers acted inappropriately to limit violations at Comanche Peak and yet he later stated that OIA didn't really have the expertise to make any hard-line calls. One would certainly have to make a technical judgment on the validity of the proposed violations before drawing that "hard line" conclusion. I would like to quote from the Arlotto Report, Appendix B, Section 1.4:

  > "There were no instances where violations were improperly reclassified by management based on the information available at the time the Inspection Report was issued"

- The investigator's definition of intimidation and harassment remains unknown. His beliefs can not be used as investigative conclusions of fact. The OIA investigation did not substantiate any threats which were intended to intimidate or harass. There certainly was no basis for discrimination since, Mr. Phillips salary was never reduced and he occupied the same office the day I left the site as the day I came on site. There were no changes to his working conditions. In order for there to have even been a basis for intimidation and harassment, management action on the technical items would have had to have been shown to be unwarranted. Again I would like to quote from the Arlotto Report, Appendix B, Section 1.4:

> "The Task Group found that there was a reasonable basis which warranted management action in the disposition of each of the 34 items as they were originally presented in the draft inspection reports"

- In addition, a Senior Resident Inspector for Construction is expected to perform commensurate with his performance elements and standards. When his performance is not commensurate with those standards; i.e., (from the Arlotto Report, Appendix B, page 6) "In summary, the inspector(s) presented poorly developed inspection findings and proposed inappropriate enforcement action", then it becomes an issue requiring management's attention. Discharging my management responsibilities should not be viewed as intimidation, harassment, and/or pressuring. Also, the Arlotto Report concluded (Appendix B, page 18) that "Based on the Task Group 2 independent assessment of the 34 inspection findings, lengthy involvement and discussion between management and the inspector was warranted to achieve disposition of the findings."

- The Investigator does not appear to recognize management's responsibilities.

- The conclusion contained in OIA Investigation Report 86-10 (page 35) does not substantiate that there was intimidation and harassment. That conclusion is as follows:

  > "There were comments exchanged by PHILLIPS and WESTERMAN which Phillips claimed were harassing and/or threatening. Westerman either denied the comments or denied the comments were intended to harass or threaten Phillips. OIA could not substantiate the comments through independent sources"

CONCLUSIONS

The following conclusions can be drawn with regard to the Comanche Peak matter:

> It is quite evident that the facts and truth surrounding the Comanche Peak matter do not substantiate that intimidation, harassment, or pressuring of the inspector occurred as alleged, but rather that Region IV management was simply carrying out its normal management responsibilities.
>
> Further, there was no mishandling of the technical issues by Regional management; i.e., the findings of the Arlotto Report clearly conclude that the Region's handling of the issues was proper. Had Region IV management been allowed to proceed, the actions being initiated would have been adequate to resolve the Comanche Peak technical issues.
>
> The OIA Investigator, Mr. George Mulley did not conduct a fair and impartial investigation. During the conduct of the investigation, there was repeated misrepresentation of the scope and intent of the investigation. The report contains misquotes of sworn testimony, inadequate technical review, and investigative "Conclusions" of fact that are contrary to fact and truth, and/or otherwise inaccurate and/ or unfounded. There were allegations by witnesses that the investigator made no attempt to substantiate, but were left to the imagination of the media and others. The interviews were selective and so narrowed that they did not present both sides.
>
> The sworn testimony of Agency employees both during the conduct of the OIA Investigation (Mr. Phillips and another RIV Inspector) and subsequently before the Senate committees (Mr. Mulley and Mr. Phillips) was contrary to the facts and truth as I understand them. Their testimony was contrary to the sworn testimony of others, documented evidence, and to the written and verbal statements of others.
>
> Contrary to official NRC policy, drafts of NRC Inspection Reports were shown to a utility consultant by certain inspector(s).
>
> The independence and objectivity of the continued inspection by Mr. Phillips of issues at Comanche Peak, that were in dispute, is certainly questionable in view of the strong differences that existed.

> The NRC Investigation Report 86-10 was issued without the opportunity for those targeted to concurrently respond or appeal the findings, without any tempering caveats, and before the Commission had drawn any conclusions. In my opinion, the immediate reactive mode (as a result of the attention by the media and others) that followed issuance of the report precluded any further opportunity for due process for those targeted by the investigation.

I again thank you for the opportunity to place on the record comments related to OIA Investigation 86-10. I would request, pending completion of the Williams investigation, the opportunity for a final comment on the record, if appropriate. I have attached for the record copies of the following memoranda (less exhibits) that I have written (I have expurgated those names removed from OIA Investigation Report 86-10 and or employees/contractors of the utility):

- T. F. Westerman, April 15, 1987, Memorandum to Sharon Connelly
- T. F. Westerman, April 24, 1987, Memorandum to Judge Gary J. Edles
- T. F. Westerman, May 20, 1987, Memorandum to Judge Gary J. Edles
- T. F. Westerman, September 1, 1987, Memorandum to David Williams, Special Investigator, GAO
- T. F. Westerman, January 21, 1988, Memorandum to Houston Fuller, Office of Special Investigations, GAO

I believe my memoranda are self explanatory. I welcome the special investigation being conducted by Mr. Williams, and I have furnished his staff with copies of the above identified memoranda. I also appreciated the opportunity, as was offered to other members of Region IV, to discuss with the representatives from GAO, on assignment to the Senate subcommittee staff, the findings and handling of NRC OIA Investigation 86-10.

Thomas F. Westerman

Thomas F. Westerman, Chief
Reactor Projects Section B